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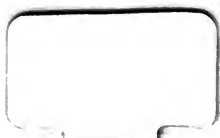
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AN INTRODUCTION

TO THE

# STUDY OF JURISPRUDENCE;

BEING A TRANSLATION OF THE GENERAL PART OF

*introd. Friedrich. Justin*

THIBAUT'S SYSTEM DES PANDEKTEN RECHTS.

With Notes and Illustrations

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OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.

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## TRANSLATOR'S PREFACE.

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THE present work is not of a speculative character, nor does it in any way discuss the principles upon which laws should be founded. Its sole object is to lay before the student the most general of those principles upon which the laws of all countries in fact more or less depend.

The importance to students of English law of some acquaintance with the principles of Roman jurisprudence is no longer insisted upon by a few, but is recognised by the majority of the leading men of the day. The appearance, therefore, for the first time, of an English translation of the best summary of the elementary principles of Roman law which has ever appeared scarcely requires apology. Nevertheless, an explanation of the more immediate objects which the translator has had in view seems requisite, as well to prevent disappointment on the part of the reader, as to justify the translator in the course he has adopted.

Whoever reflects for a moment upon the present condition of English law, and upon the enormous quantity of the materials from which alone a useful knowledge of its actual state is obtainable, cannot fail to see that no person who has to master them will have time at his command seriously to study the details of the Roman, or any other system of jurisprudence. Such a study is itself sufficient to engross the whole time and attention of any

person, even if he be endowed with more than ordinary capacity. On the other hand, it is highly desirable, and perfectly feasible, for him who makes it the serious business of his life to study and practise any particular system of law, to possess as part of his *general* education a knowledge of the leading principles of other systems, and especially of the Roman, the basis of them all.

To an English barrister knowledge of this kind is, no doubt, rather indirectly than directly useful, although its direct use is probably greater than is ordinarily supposed. Indirectly, the greatest advantage to be derived from a study of the Roman law, and of the works of continental jurists, appears to the writer to be the acquisition of a habit of classification, and consequently of duly appreciating points of resemblance and of difference. The great skill with which many of the writers on Roman law have combined and systematised the immethodically arranged contents of the *Corpus Juris Civilis* contrasts in a striking manner with the defective arrangement observable in the works first placed in the hands of an English student. This observation is not intended to imply that there is no well-arranged English law book, but only that there is no work in which due attention is paid to the distinction between the general and the particular, and in which the great principles of our jurisprudence are so brought together that the more simple precede the more complex, and the most nearly related stand closer to each other than to the more distantly allied. This is the more to be regretted, as from the great subdivision of labour characteristic of our own system, a student is only too likely to be bewildered by the acquisition of particular facts which he is wholly unable to systematise.

Of all the works which have appeared upon the Roman law, there is none of more universally admitted excellence than that of

which a portion is here translated. In order that its merits may not be deemed too highly appreciated by one who may be considered an interested witness, the writer transcribes the opinion of Mr. George Long, than whom no person in this country commands or is entitled to more respect upon such matters. "The two works," says he, in an introductory lecture to a course on jurisprudence and the civil law, "which I shall chiefly use for my purpose, are the 'System des heutigen Römischen Rechts,' an unfinished work by Savigny, 5 vols., 8vo, and the 'System des Pandekten Rechts' of Thibaut. It is nothing extravagant, when I say, that any praise which could be bestowed on these two works by any man the most competent to judge would not be exaggerated. They are characterised by a soundness of knowledge, clearness of expression, perspicuity of arrangement, and a subtlety and depth of thought that have seldom been equalled by any writer on the subject and cannot be surpassed. The reader is never bewildered with useless distinctions, or deceived by specious generalities, which so often mean nothing; everything has a definite object, and while the mind is filled with knowledge it is prompted to activity and fertilised with suggestions. The general is never conceived without an adaptation to the particular, and the particular is always in its proper place, subordinate to the general."\*

The translation is from the text of the ninth German edition, published after the author's death, and edited by Dr. Buchholtz. The arrangement is that of the same edition, except that §§ 80a, 80b, 80c, 117a, 117b, 117c, 117d, which by the German editor were placed elsewhere are brought back by the translator to the position in which the author left them. The greatest care has been taken to render the author's meaning truly, and where this has appeared doubtful Thibaut's own essays and the references

\* *Two Discourses delivered in the Middle Temple Hall*, by George Long. London: Knight, 1847, pp. 40, 41.

in the notes have, when possible, been sedulously compared. It is nevertheless felt, that, owing to the exceeding brevity of the author's style and the great compression of his matter, his exact meaning may not have been everywhere apprehended; such occurrences however it is hoped are rare, and for them the translator throws himself upon the indulgence of the public, in the full assurance that they will not impute them to any disposition on his part to slur over the difficulties he may have had to encounter.

The notes and references at the foot of the body of the work are all (with two or three obvious exceptions marked with an asterisk) taken from the 9th German Edition, and whilst for any variation between the notes in that edition and those in the present translation the translator is alone responsible, he does not guarantee the accuracy or relevancy of the references themselves. It may be assumed that the frequent revisions of the author and the care of the last German editor leave nothing to be desired on this head.

The notes and illustrations forming the appendix to the present volume are intended for two purposes, viz.; first, to assist the English student in understanding the text, and second to enable him to compare the Roman with our own jurisprudence. The notes of the first class have been translated or abridged from the works referred to in each case; the selection has been made mainly with a view to illustrate principles of general importance and not to explain matters which, although mentioned or referred to in the text, are not of such a nature as to interest the majority of English students; nevertheless, it is hoped that no explanation has been omitted which is necessary to enable a person with the *Corpus Juris* at his elbow readily to understand the text. The notes of the second class are not intended as essays on the English law, but only to serve as guides to

the student, and to enable him to compare the most important principles in the body of the work with those which are recognised in our own jurisprudence.

For reasons which may be gathered from the earlier part of this preface, it has taken no little time and labour to collect the materials for some of these notes and to arrange them in their present shape ; but both time and labour have been expended willingly, in the hope that the results may prove serviceable to those who, anxious to discover the most important general principles of our law, are at a loss where to search for them. The authorities which are referred to, are such as the writer has met with during his own studies. He does not profess to have succeeded in obtaining those best suited to his purpose, by ransacking the reports from the Year-books downwards ; doubtless, persons of greater experience and knowledge could have made a better and more ample selection, and upon some future occasion the nucleus now formed may be expanded by further labour into a systematic arrangement of the general principles of English Law.

The analytical table of contents is not a translation of the corresponding portion of the German edition, but is wholly new, and has been framed for the express purpose of presenting to the eye a full outline of this portion of the author's system. The index also is entirely new. The aim of the translator has, in short, been to render the present volume complete in itself, and thereby to increase its utility not only as an introduction to the remainder of Thibaut's work (consisting of the Roman Law of Property, Obligations, Marriage, and Succession), but also as an introduction to the study of Jurisprudence generally.

LINCOLN'S INN,  
*Christmas, 1854.*

LIST OF WORKS to which the translator has himself constantly referred, and which will be found useful to students of Civil Law and Jurisprudence.

1. A Dictionary of Greek and Roman Antiquities, edited by William Smith, Ph. D. London: Taylor and Walton, 1842. [The articles on Roman Law are from the pen of Mr. George Long.]
2. Erörterungen über die bestrittensten Materien des Römischen Rechts in Zusätzen zu Thibaut's Pandecten System 7te aufl. Herausgegeben von J. R. Braun. Stuttgart, 1831. [Referred to as Braun or Braun's Erör.]
3. Erörterungen einzelner Lehren des Römischen Rechts. Ein Commentar zu der 8ten aufl. des Pandekten Rechts von A. F. J. Thibaut. Herausgegeben von Dr. H. Froben. Stuttgart, 1836. [Referred to as Froben or Froben's Erör.]
4. Versuche über einzelne Theile der Theorie des Rechts von A. F. J. Thibaut. 2te verb. Ausg. Jena, 1817. 2 vols.
5. Civilistische Abhandlungen von A. F. J. Thibaut. Heidelb. 1814.
6. Lehrbuch des heutigen Römischen Rechts von Dr. F. Mackeldey. 12te Ausg. von Dr. K. F. Rosshirt. Giessen, 1842. 2 vols.
7. Cursus der Institutionen von G. F. Puchta. 2te verb. aufl. Leipsig, 1845. 3 vols.
8. Leitfaden für Pandekten Vorlesungen von Dr. K. A. von Vangerow. Marb. u. Leipsig, 1848. 3 vols. [An extremely useful work in which difficult questions are very ably discussed.]
9. System des heutigen Römischen Rechts von F. C. von Savigny. Berlin, 1840—1849. 8 vols.
10. Explication historique des Instituts de l'empereur Justinien. Par M. Ortolan. 4ème éd. Paris, 1847. 2 vols.

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## CORRECTIONS AND ADDITIONS.

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### APPENDIX.

- Page xxvi. Note to § 38, par. II.—In matters criminal, &c. Piracy is an exception to the rule here stated. Piracy is an offence within the criminal jurisdiction of all nations; it is against all and punished by all. 1 Kent Com. 188.
- xxviii. Note to § 56 is misplaced; it should have come after the next note, and on page xxx.
- xlix. Note to § 71. In the paragraph No. 2, before the words, "But heirs are in no case," &c., insert "And by 3 & 4 Wm. IV. c. 104, lands in the hands of an heir are made assets in equity for the payment of the simple contract debts of his ancestor." And in the foot-note *k*, add "11 Geo. IV. & 1 Wm. IV. c. 47, § 6; 3 & 4 Wm. IV. c. 104."
- li. Note to § 78. In the foot-note *g*, add "Debts vested in the Crown are transferable at law. *Lambert v. Taylor*, 4 B. & C. 138."
- lxxiv. Note to § 117 A, foot-note *d*, add "And a covenant not to sue one is no defence to an action against the others, *Dean v. Newhall*, 8 T. R. 168; nor is a covenant by one not to sue a defence to an action brought by all, *Walmesley v. Nelstrop*, 11 A. & E. 216."
- lxxxiii. Note to § 140, foot-note *d*, add "*Davis v. Garrett*, 6 Bing. 716; *Caffrey v. Darby*, 6 Ves. 496."
- lxxxvi. Foot-note *f*, add "*Davies v. Mann*, 10 M. & W. 546; *Martin v. The Great Northern Railway Co.*, 16 C. B. 179; *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195." The words in the text just above the reference to note *f* require to be modified. The words "as much as the want of such care on the other side," should be struck out; and the words "in any degree really" should be inserted before the word "contributed."
- xciii. Note to § 187, foot-note *b*, add "*Schinaling v. Thomlinson*, 6 Taunt. 147; *Edmiston v. Wright*, 1 Camp. 88."
- cvi. Note to § 190. On the subject of ratification, see the important case of *Wilson v. Tumman*, 6 Man. & Gr. 236, which shows that in order that one person may make the act of another his own by ratification, the latter must have assumed to act for the former.
- cvi. Note to § 191, placed on p. cv., should have come in on p. cvi., immediately before note to § 192.
- cvi. Note to § 194. See further as to protests, *Balsh v. Hyam*, 2 P. W. 453; *Wegener v. Smith*, 15 C. B. 285; *Smith v. Sieveking*, 4 E. & B. 953.
- cxiii. Note to § 206, 207. In the text referring to the foot-note *f*, instead of the words "in the absence of a fraudulent concealment," insert "at law," and in the next line, after the word "not," insert "in equity begin to." In the foot-note *f*, insert "But see *Bree v. Holbech*, Dougl. 655," and in the foot-note *g*, strike out the reference to this last case.
- cxxiv. Note to § 230, 231, section 2. The recent case of *Thomas v. Thomas*, 2 K. & J. 79, shows that in equity a *bond fide* possessor will not, except under special circumstances, be compelled to account for mesne profits from a time anterior to the filing of the bill.

# GENERAL PRINCIPLES OF ROMAN LAW.

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## PART I.

LAWS AND JURISPRUDENCE CONSIDERED BY THEMSELVES.

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### CHAPTER I.

OF THE NATURE OF LAWS AND OF JURISPRUDENCE GENERALLY.

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#### I.—POSITIVE LAWS AND THEIR EFFECT.

##### § 1.

LAWS which one person can compel another to observe are called Positive Laws (*Jus* in the sense of *Law*); and their effect always consists in this, that a duty is imposed upon one person which he can be compelled to perform at the will of some other. The latter has a power to act (*Jus* in the sense of a *Right*); the former is under a necessity of acting (*necessitas, officium*, in modern Latin *obligatio*, duty, obligation).<sup>a</sup> Neither this power nor this necessity can exist without the other; <sup>b</sup> *Jus et obligatio sunt correlata*.

#### II.—JURISPRUDENCE.

##### § 2.

Positive Laws, in order to be accurately understood, require to be represented in a scientific or systematic form, and when thus

<sup>a</sup> See, for the true meaning of the term *obligatio* Hugo, Civil. Mag. B. 3. Nr. 20. B. 5. Nr. 3.; and of the term *Jus*, *post* §§ 8, 34, 64.

<sup>b</sup> L. 7. de annuis legat. (33. 1.).

represented they constitute the science of Positive Law (*Jurisprudentia*, sometimes also *Jus*). A system of Law, founded on logical principles, should consist of two parts; viz., a *general part* in which the great leading ideas and principles of law are brought together, and a *special part* in which the nature of each law is separately examined and its application to individual cases correctly determined.

This special part should be further divided upon principles which lead to the most important practical results, and there can be no doubt that these follow from a division which has reference to the persons upon or in whom rights are conferred or vested. With reference to these persons, the special part may be divided into three great divisions, viz.:—

1. PUBLIC LAW (*Jus publicum s. lato*) or that which treats of the relations existing between the government and individual members of a given state;

2. PRIVATE LAW (*Jus privatum*, sometimes called Civil Law) or that which treats of the relations of those individual members *inter se*;

3. INTERNATIONAL LAW (*Jus gentium* in the modern sense) or that which treats of the relations existing between a government with its people and strangers.

Public Law must be further subdivided into

CONSTITUTIONAL LAW (*jus publicum* in a narrow sense), consisting of such public laws as are binding on the Sovereign, and

ADMINISTRATIVE LAW, consisting of such public laws as proceed from the mere exercise of the lawgiving power. To the last belong Criminal Law, laws relating to Public Finance and those relating to Police.

Laws relating to *Civil Process* and those relating to *Status familiæ* belong partly to Administrative, partly to Private Law. For those laws which relate to Civil Process certainly treat of the relations of the individual members of a given state *inter se*, and also of those which exist between such members and the Sovereign, here represented by his Judges. On the other hand, the law relating to *Guardianship* is nothing but part of the law of Police, whilst

the law relating to *Parental Authority*, so closely allied to that relating to Guardianship, is treated even in Justinian's collections almost as if it concerned parents and their children alone.

### § 3.

In conformity with the present rules of our Universities, the teacher of Roman Law<sup>c</sup> must leave to others the task of investigating most of the above branches of Jurisprudence and confine himself to the general principles and their special application to private law, the laws of Guardianship, and of Parental Authority.

### § 4.

The most important branch of Roman Jurisprudence is by many supposed to be what is called Private Law, and to its principles, in their opinion, a general introduction ought to be confined. But the greatest portion of Roman law, as applied in modern times, consists of general principles only, and but a small portion of it is composed of pure Private law. For not only are the principles developed in the present work useful for the understanding of every other special branch of the law, but they are essential to the complete knowledge of the doctrines respecting Contracts, Property, Easements, and Pledges; and this is true whether in applying these doctrines we have to consider the relations existing between the individual members themselves of a state, or those existing between them and the sovereign of the same state, or, lastly, those existing between one state and another. The laws of succession, and of parental authority, may fairly be considered as branches of Private law, but the laws which relate to Guardianship are, undoubtedly, most closely allied to the Law of Police.

## 1. Thibaut's System.

### § 5.

Whoever has had to teach beginners any developed historical science must have found himself compelled to abandon the plan

<sup>c</sup> See upon this subject E. F. Vogel über die Bestandtheile des Pandektenrechts. Leipzig 1831. 8.

of procedure dictated by strict logical principles, and so to arrange his matter that that which is first treated of may render what follows as intelligible as possible. From considerations such as these, and no others, the author has \* been induced to divide the present work into four books, of which

The first	contains the	General Principles.
„ second	„	Law of <i>Status</i> .
„ third	„	„ Obligations.
„ fourth	„	„ Real Property and of Succession.

The doctrines relating to prescription are contained in an appendix, both because they can only be understood after a knowledge of all the above subjects has been acquired, and because a separation of these doctrines and distribution of them amongst the body of the work can only lead to confusion and to superficial attainments.<sup>d</sup>

## 2. Roman Systems.

### § 6.

The Romans cannot be said to have done much towards systematising law. In their division of law into *Jus sacrum, publicum* and *privatum*,<sup>e</sup> or *publicum* and *privatum*,<sup>f</sup> so confused was the most important notion of all, namely, that of their *Jus publicum*, which is merely directed to the public welfare, that very many doctrines deemed in modern times to belong to the division of private law,<sup>g</sup> can be referred to the other Roman division; yet, in this matter the most accurate discrimination was requisite in consequence of the important principle, that the public law cannot be altered at the will of private individuals.<sup>h</sup>

\* *i. e.* in the 8th edition, from which this § is translated.

<sup>d</sup> Notwithstanding the last lines of the text, the learned editor of the ninth edition broke up the Appendix on Prescription, and placed a great portion of it amongst the General Principles, and the rest of it elsewhere in the bulk of the work. So much of this branch of the law as can be understood without a knowledge of the contents of the second and subsequent books of the original system, will be found in the present translation. *Trans.*

<sup>e</sup> Quintilianus inst. orat. II. 4. Ausonius Idyll. XI. 61.

<sup>f</sup> Livius III. 34. Plinius epist. I. 22. L. 1. § 2. de iust. et iure (1. 1). Hänsel Handbuch der Institutionen Bd. 1. Leipz. 1842. p. 188—198.

<sup>g</sup> Burchardi Grundzüge des Rechtssystems der Römer. Bonn 1822.

<sup>h</sup> L. 38. de pact. (2. 14.) L. 5. § 7. de admin. tutor. (26. 7.)

Those works of the Romans in which a sort of attempt at a system is made are not worthy of imitation. Their endeavours to generalise are very feeble,<sup>1</sup> and the order of the Pandects (which, with some trifling exceptions, is followed in the Code), is so faulty that the arrangement of the Institutes, bad as it is, is comparatively excellent. Even if we admit that the Pandects were arranged to suit the convenience of judges, still everything in them is most immethodically put together,<sup>k</sup> and the matter is not mended by being told that the order was nearly the same as in the Prætor's Edict, and was borrowed from the Twelve Tables, or had reference to the old *Legis actiones*.<sup>l</sup>

The arrangement of the Institutes is, for beginners, tolerably good,<sup>m</sup> and being adapted to the Roman definition of Jurisprudence,<sup>n</sup> is not altogether illogical. But even granting that the Jurist has to take everything into account in every matter, and therefore to bear in mind all the doctrines relating to the subjects of rights (*Jus personarum*), and all the doctrines relating to that which is not the subject of any right (*Jus rerum*), and has moreover correctly to apply both of these (*Jus actionum*), still if rights and duties are looked upon as the great objects of law, it is logically incorrect to treat that which is of most importance, as if it were only of secondary consideration, and to discuss the doctrines relating to rights and duties as incidental to those relating to incorporeal things, and to make a third principal division of the law relating to actions, which in reality is a branch of that relating to things.<sup>o</sup> It is at

<sup>1</sup> See the first titles in the Institutes and Digest, and the attempt at generalisation which is often most successful when it comes last, in Dig. L. 8. T. 4. L. 30. 31. 32. and Cod. L. 3. T. 38. L. 6. T. 43. 59. L. 7. T. 15. 30.

<sup>k</sup> Donelli comment. L. 1. c. 1.

<sup>l</sup> This opinion is entertained by Heffter im Rheinischen Museum 1. Ihrg. 1. Hft. Nr. 2.

<sup>m</sup> A. F. Schilling Institutionen B. 2. Leipz. 1837. § 2. appx.

<sup>n</sup> Given in L. 10. § 2. de iust. et iure (1. 1.) It has been much observed upon. Brissonii antiqu. L. 14. c. 16. Thibaut Vers. 2. B. 6—8. Welcker Rechts-, Staats- und Gesetzgebungslehre. Stuttg. 1829. p. 512—518.

<sup>o</sup> With regard to the Institutes of Justinian and Gaius, I unhesitatingly retain the opinions formerly held by me, and which have been also defended by others. They have, however, again been attacked by Hugo civ. Mag. B. 4.



any rate indisputable that those principles which pervade every branch of Jurisprudence should be at the outset brought together, and what is in German treatises commonly called the General Part, should consequently contain such explanations of the elementary notions of Positive law, Rights and Duties, as may be requisite for the thorough understanding of more special matters.

Nr. 1. 9. B. 5. Nr. 15. B. 6. Nr. 15. The reproach of obstinacy is certainly deserved by one of us. See Savigny System B. 1. § 59.

## CHAPTER II.

OF LAWS WITH REFERENCE TO THEIR SOURCES.

## I.—OF NATURAL LAW AND ITS LEGAL FORCE.

1. *Jus naturale*, &c.

## § 7.

WITH respect to the sources of Law the Romans had the following notions: every individual member of a political community is, as an animal, subject to the laws of Instinct; as a human being, to those which are dictated by the reason of mankind; and, lastly, as an individual member of a political community, to those laws which are sanctioned by the sovereign powers of that community. These three sorts of laws are respectively designated by the Romans *jus naturale*,<sup>p</sup> *jus gentium*, sometimes also *jus naturale*,<sup>q</sup> and *jus civile*, in its most extensive sense.<sup>r</sup> The proper source of this *jus gentium* is what in modern times is called the moral sense, or the natural feeling of justice; this, together with the moral notions at the time common to all nations, the Romans were not backward in recognising as authority, although they did not feel themselves compelled to found their *jus gentium* wholly upon it.<sup>s</sup> The *jus gentium* of the

<sup>p</sup> pr. I. de jure natur. (1. 2.) L. 1. § 3. de iust. et iur. (1. 1.)

<sup>q</sup> Cicero pro Sextio c. 42. 11. § 1. 11. I. de rer. div. (2. 1.) Theophilus L. 1. T. 2. pr. L. 11. de iust. et iur. (1. 1.) L. 2. 3. 4. de rer. div. (1. 8.) L. 4. § 2. de grad. (38. 10.) L. 32. de R. I. (50. 17.) Savigny System B. 1. Beilage I.

<sup>r</sup> L. 6. pr. de iust. et iur. (1. 1.) In a narrower sense *jus civile* means the law peculiar to the Roman State. L. 1. pr. de A. R. D. (41. 1.) Sometimes it is opposed to *jus honorarium v. prætorium*. L. 7. de iust. et iur. (1. 1.) Sometimes it means that which is fixed by the *interpretatio prudentium*. L. 2. § 5. 12. de O. I. (1. 2.); and lastly it is opposed to criminal law. Tit. C. quando civilis actio (9. 31.).

<sup>s</sup> Cicero de inventione II. 22. Gaius I. 189. L. 6. 11. de iust. et iur. (1. 1.)

Romans, being dependent entirely upon natural feeling, did not rest upon any abstract principle. They did, however, recognise many principles as general rules, particularly the principle, that by the natural law all agreements should be observed,<sup>1</sup> and that, in the absence of any special right, no one ought to enrich himself to the damage or from the property of another.<sup>2</sup>

### § 8.

The *jus civile*, or, in the language of modern writers, *jus positivum*, has every possible civil effect, and, whether based on the principles of natural law or not (*jus positivum mixtum, et merum*), can be taken advantage of as well by action as by plea (*exceptio*). The *jus gentium*, as a general rule, can be taken advantage of only by way of defence;<sup>3</sup> and only those duties with their correlative rights which can be enforced by an action founded on the *jus civile* are, strictly speaking, *obligationes*,<sup>4</sup> although this term includes such duties as are enforceable by action by the practice of the Roman Courts, e.g. the duty which arises in case of an improper acquisition of property to the damage of another.<sup>5</sup>

The German courts, following the Canon Law, hold that the performance of a duty arising merely from natural law can be enforced by an equitable action (*actio in factum, imploratio officii judicis*),<sup>6</sup> and that such duties, like those founded on positive law,

Theophilus L. 1. T. 2. pr. Puchta *Gewohnheitsr* 1. Bd. 1—44. Also in his *Cursus der Institutionen* B. 1. 357. See *contra*, Dirksen im *Rhein. Mus.* 1. B. 1—50., and in his *Vermischten Schriften* B. 1. Nr. 9.

<sup>1</sup> L. 1. pr. de pact. (2. 14.).

<sup>2</sup> L. 17. § 4. de inst. act. (14. 3.) L. 6. § 2. de iure dot. (23. 3.) L. 206. de R. I. (50. 17.) cap. 48. de R. I. in 6. (5. 13.). W. Sell *Versuche* 1. B. Nr. 1. See further, § 8. & Weiske *Rechtslexikon* B. 1. 925.

<sup>3</sup> L. 10. 178. § 3. de V. S. (50. 16.). A. F. E. Lelievre *quid sit obligatio naturalis ex sententia Romanorum*. Lovan. 1826. p. 37—42. 69—71. See *contra* Weber v. d. natürl. Verb. § 43—47. 51. 55. 88. 99. Compare Unterholzner *die Lehre von den Schuldverhältnissen* B. 1. Leipz. 1840. § 6—9.

<sup>4</sup> pr. I. de obligat. (3. 13.).

<sup>5</sup> See § 7, note u and L. 15. de dolo (4. 3.) L. 23. § 4. 5. de R. V. (6. 1.) L. 1. § 2. L. 2. 3. pr. commod. (13. 6.) L. 12. § 1. de distract. pignor. (20. 5.) L. 14. § 1. de reb. auct. iudic. (42. 5.). Sell 32—39, *ubi sup.*

<sup>6</sup> Cap. 6. X. de iudic. (2. 1.) Weber *Beiträge* 2. St. 6. K. Röder *Abhandlungen*. Giess. 1833. Nr. 6. See *post*, § 73.

are enforceable to their full extent (*efficax*), and are only to be held limited (*restricta*) or wholly invalid (*destructa, reprobata*), when limited or destroyed by positive law. The degree, consequently, to which a duty founded entirely on natural law is to be limited must depend upon the precepts of positive law,<sup>b</sup> and if such a duty be thereby totally destroyed, it must be treated as wholly without effect.<sup>c</sup> But even in this case such a new state of circumstances may arise from a performance of the duty with full knowledge of all the facts as may be sufficient to prevent the recovery back of what may have been given in fulfilment of it.<sup>d</sup>

## 2. Moral and Natural Law.

### § 9.

It is a common modern opinion that the moral law leaves every thing to conscience, and that therefore a judge should take no notice of moral duties, unless they be also recognised by positive law.<sup>e</sup> The Romans, however, did not see the subtle distinction drawn by later philosophers between moral law and natural law, and held every duty imposed by the prevailing notions of morality, sense of honour, and propriety, to be a *debitum naturale*, enforceable by way of defence (*exceptio*).<sup>f</sup> In this view are to be regarded their three *præcepta juris; honeste vive, alterum non læde, suum cuique tribue*,<sup>g</sup> precepts which can hardly serve as the basis of jurisprudence, inasmuch as no two persons agree as to their application.<sup>h</sup>

<sup>b</sup> See further *post*, § 191, and generally Rosshirt Zeitschrift. B. 1. p. 123—155.

<sup>c</sup> L. 6. de iust. et iur. (1. 1.) compared with L. 25. de statu hom. (1. 5.) L. 16. § 1. ad SCtum Vell. (16. 1.) I. 3. C. de aleator. (3. 43.) L. 3. C. de pact. pign. (8. 35.).

<sup>d</sup> See *post*, § 78.

<sup>e</sup> Weber *ubi sup.*, § 98. 99.

<sup>f</sup> L. 25. § 11. de hered. pet. (5. 3.) L. 26. pr. L. 32. § 2. de condict. indeb. (12. 6.) L. 8. in quib. causis. pign. tac. (20. 2.), compared with many similar passages which are cited *post*, §§ 91. 144. 484. 499. Thibaut Versuche 2. B. p. 132—158. I. Pan. de grati animi officiis. Lugd. Bat. 1809. p. 146—148. G. Boreel de veterum Ictorum honestatis studio. Lugd. Bat. 1823.

<sup>g</sup> L. 10. § 1. de iust. et iur. (1. 1.) Savigny System B. 1. § 59.

<sup>h</sup> Sintenis Civilrecht B. 1. § 5. But see Welcker Rechts—&c. Lehre, 544—552.

## II.—OF POSITIVE LAW IN PARTICULAR.

### § 10.

Positive law which is by far the most important of all the sources of law, may arise either from commands proceeding directly from the supreme power of a state, or from the concurring views either of the judicial authorities or of the individual members of that state by virtue of a sort of lawgiving power entrusted to or left with them by the supreme authority. Law of the first description, whether it be actually written or not, is usually called *Jus scriptum*, law of the two last descriptions *Jus non scriptum*. According to some writers these expressions have a technical and so to speak classical signification;<sup>i</sup> but the Romans seem to have understood them in their literal ordinary meaning.<sup>k</sup> For the sake of conforming to usage the technical sense must however be examined and explained.

### 1. Written Law.

#### A. DIVINE LAW.

### § 11.

Positive written law is divided, by those who believe in a Divine revelation, into *Divine* and *Human*. The former again is either *Particular* or *Universal*, according as it is applicable to a certain class of persons only, or is binding on mankind in general. That the Old Testament is applicable to the Jews is considered by them as clearly established;<sup>l</sup> but there is no unanimity of opinion upon the question whether the Bible is universal law for all mankind or is only to be considered binding upon Christians.<sup>m</sup> The Jurist,

<sup>i</sup> C. L. Crell de origine et virtute iuris non scripti. Viteb. 1729. Glück Pand. 1. Bd. § 82. Zimmermann Gesch. d. Röm. Privat-R. 1. Thl. 51—54.

<sup>k</sup> L. 32. pr. L. 36. de LL. (1. 3.). Noodt ad Pand. L. 1. Tit. 1. in med. Hänsel Handbuch der Institutionen B. 1. 210—299, 327—362. 1 Sav. Syst. § 22.

<sup>l</sup> Upon the other particular laws of the Jews see Blume das Kirchenrecht der Juden und Christen. 2. Aufl. 17—21, and upon the duty of Jews to conform to German law, see Rheinisches Mus. 3. Jahrg. Nr. 24.

<sup>m</sup> Compare Meister num ius divin. detur posit. univ. (in eius exere. F. 1.) Michaelis Mos. Recht. 1. Th. § 2. Hellfeld de leg. Mos. valore hodiern. (in his Opusc.). Bericht. u. Zus. z. d. Inst. d. R. R. 140—151. Schöman Handb. 2. B. 32—45.

holding himself aloof from every religious sect, can only observe that the Bible is not universally promulgated. Whether the Bible was intended to be universally binding, whether the Mosaical law<sup>n</sup> is or not entirely repealed by the New Testament, and whether the last does or not contain moral precepts only<sup>o</sup> are questions which must be answered by Theologians and not by lawyers. Thus much however is juridically speaking clear; According to the Roman law the moral precepts of the New Testament, so far as they are confessedly the foundations of duties of love, cannot be considered, in a *christian* state, as non-existing, but must rather be therein treated in the same way as the Romans treated recognised moral duties (*ante* § 9).

## B. HUMAN LAW.

### § 12.

**Adopted Law.**—The positive Human Law of Germany is partly *adopted*, i.e. derived from the law of other countries, partly *home-sprung*, i.e. of German origin. The former consists of—

I. The ROMAN LAW contained in the collections of Justinian, viz. the Institutes, Pandects or Digest, new Code and Novels so far however only as they are glossed;<sup>p</sup>

II. The CANON LAW consisting of—

<sup>n</sup> As for example K. L. Nitzsch ü. die Ungült. d. Mos. Ges. &c. Wittenb. 1800. 22 supposes.

<sup>o</sup> As is declared amongst others by Popp v. Ehescheidungen. 1—3. Abh.

<sup>p</sup> Of a contrary opinion are C. A. Beck de novell. Leonis earumque usu et auctoritate, and Dabelow Handb. 1. Thl. 198—201. Wening Lehrb. 1. B. Einl. § 2. But compare Walch contr. p. 11. Zepernick mantiss. ad Beck de Nov. Leon. cap. 3. On the unglossed passages in the Codex see G. W. Hugo über die nicht glossirten Stellen in Codex. Jena 1807. Glück Handb. I. p. 271—274. G. A. Cramer sacra natalia Friderici VI etc. Kil. 1826, p. 47—59. K. Witte die leges restitutæ des Justinianischen Codex. Bresl. 1830, and on the number of glossed novels: Hugo civ. Mag. 3. B. Nr. 2. & 7. P. F. Weiss historia Novell. litterar. Partic. 1. Marb. 1800. Thibaut civ. Abh. 215. Savigny Zeitschr. 4. B. Nr. 4. Glück Handb. 1. B. 231—233. Biener Geschichte d. Novellen 243—249. On the different views of the Glossators see G. Haenel dissensiones dominorum. Lips. 1834, and for their history F. v. Savigny Gesch. d. R. R. im Mittelalter. Heidelb. 1815—1831. See too Osenbrüggen in Linde Zeitschrift Bd. 17. Nr. 11.

1. The *Decretum Gratiani* containing excerpts from the Fathers, several ecclesiastical and temporal laws, &c., composed A.D. 1151 ;

2. Gregory the IXth's collection of Decretals (*Liber extra Decretum*), with similar contents published A.D. 1234 ;

3. The collection of Decretals by Boniface VIII. (*Liber Sextus*) A.D. 1298.

4. A collection of orders of Clement V. (*Clementinæ*), composed A.D. 1311.

5. The so-called *Extravagantes* of John XXII. collected A.D. 1340, and the *Extravagantes communes* of A.D. 1483 ; the former consisting of Decretals of John XXII., the latter of Decretals of the Popes from Urban IV. to Sixtus IV., and both made law by Gregory XIII., A.D. 1580.<sup>9</sup>

III. The *Libri* or *consuetudines Feudorum* commonly printed at the end of the *Corpus Juris Civilis*.<sup>r</sup>

### § 13.

The law adopted from the above sources is only binding in Germany,<sup>s</sup> so far as the homesprung law and its analogies do not interfere with it.<sup>t</sup> The application too of the laws contained in the above collections becomes less and less frequent in proportion as the circumstances for which those laws were made cease to exist.<sup>u</sup> The fact that laws better adapted to existing circumstances are required, or that the reasons of the Roman

<sup>9</sup> J. W. Bickell über die Extravagantensammlungen. Marburg 1825. Their reception is to be proved.

<sup>r</sup> E. A. Laspeyres über die Entstehung und die älteste Bearbeitung der Libri feudorum. Berlin 1830.

<sup>s</sup> Not. O. v. 1512. I. § 1. 3. K. G. O. v. 1555. Th. 1. Tit. 13. § 1. H. G. O. Art. 118, 126. A. Duck de auctorit. iur. civ. Lips. 1676. Walch controuv. p. 3. 4. Peculiar ideas are held by Tönsen Grunds. eines allg. positiven Privatrechts. Kiel 1828. Preface.

<sup>t</sup> L. 6. § 1. de V. S. (50. 16.). I. I. Huck de hodierno iuris Romani usu. Tubing. 1830. Vogel über die Bestandtheile des Pandektenrechts. Leipz. 1831. 18—32. 49—86.

<sup>u</sup> Weber's Reflex. zur Beförd. einer gründl. Theor. v. heut. Gebr. des R. R. (also in his Vers. 1. B. Nr. 1.).

Laws have ceased, is no Juridical ground for their non-enforcement.\*

### § 14.

**Homesprung Law.**—Of homesprung laws some are binding over the whole, others over certain portions only of Germany. The former consist of the laws of the German Empire<sup>7</sup> and confederacies<sup>8</sup> (*Reichs-und Bundes-gesetze*); the latter are either Territorial, Provincial or Local, according as they are binding over a territory consisting of several Provinces, a District of the same, or only single places.

## 2. Unwritten Law.

### § 15.

With regard to unwritten law it is necessary to observe in the first place that every person who is not prevented by a written law can, without requiring any general permission or special approval from the supreme power, subject himself to laws by agreeing to observe them; but in order that a person may be bound by a law which does not proceed from the supreme power, and which such person has not himself agreed to observe, proof must be given of the existence either of some general permission or of a special approval of the supreme authority, by virtue of which the necessity is imposed upon him. Laws of the first description may, for the sake of brevity, be termed *conventional*, and those of the second description *ordained unwritten laws*.

## A. JUDICIAL DECISIONS.

### § 16.

To the last-mentioned class of unwritten law belong Judicial decisions (*res judicatae*). In every tribunal those rules, whether relating to mere judicial forms,<sup>a</sup> or to points arising in the course

\* Thibaut *Theorie d. log. Ausl.* § 16. See however Schweppe *Röm. Priv. R.* 1. B. § 16. *contra* W. Müller *Civ. Abh.* Bd. 1. Giess. 1833. Nr. 5. § 5.

<sup>7</sup> Mevius P. 2. Dec. 185. Hufeland's *Beitr.* 1. Hft. 3. St. Savigny *System* Bd. 1. § 2.

<sup>a</sup> These are only binding after they have been promulgated in the state to which they are to apply. K. E. Weisz *deutsches Staatsrecht*. Regensb. 1843. § 7.

<sup>8</sup> S. Stryk *de stylo curiae* (Diss. T. 1. n. 23.).



of litigation, which have been *in that tribunal* frequently and constantly recognised and acted upon, must, so far as they are uniform and not *against* law,<sup>b</sup> continue to be recognised and acted upon<sup>c</sup> in all future parallel cases.<sup>d</sup> The decisions of one tribunal are not binding upon another of co-ordinate jurisdiction; but those of a superior are binding on an inferior tribunal, not, however, to such an extent as to interfere with a decision already perfected.<sup>e</sup> The opinions of jurists, although they may under certain circumstances be considered as authority, have not the same weight as judicial decisions.<sup>f</sup>

It is not uncommon to denote judge-made law and customary law taken together by the term *observantia*; this word strictly speaking however signifies the tacit agreements of the members of a *Collegium*. These agreements merely require for their validity the single act of assent.<sup>g</sup>

## B. CUSTOMARY LAW.

### § 17.

Equal legal force belongs to Customary law (*jus consuetudinarium, consuetudo, mores majorum*).<sup>h</sup>

<sup>b</sup> L. 4. L. 13. C. de sentent. et interloc. (7. 45.).

<sup>c</sup> L. 38. de LL. (1. 3.) L. 3. C. de aedific. privat. (8. 10.) L. 12. § 5. C. de R. C. (4. 1.) L. 11. C. de iniur. (9. 35.). The contrary is supposed by E. A. Haus Vers. über den rechtl. Werth d. Gerichtsgebr. Erl. 1798. § 7—20. Jordan im Archiv für civilist. Prax. 8. B. Nr. 9. 191—260. See *contra* W. Müller *ubi sup.* Nr. 5. Wächter im Archiv für civ. Prax. B. 23. Nr. 15.

<sup>d</sup> Berger oecon. iur. L. 1. T. 1. § 19. not. o.

<sup>e</sup> arg. § ult. I. de satisdat. (4. 11.) J. R. A. § 137. Schweppe Röm. Priv. R. 1. B. § 6. Savigny System 1. B. § 20. See especially Wening Lehrb. 1. B. § 16.

<sup>f</sup> I. H. Boehmer de iniusta theor. et prax. opposit. & de servitute triturae forensis (in Exerc. ad P. T. 1.). Savigny System 1. B. § 19. 20.

<sup>g</sup> Gribner de observ. colleg. iurid. (in opusc.). Schnaubert Beitr. z. Staats-u. K. R. 1. Th. Nr. 6. Meurer jur. Abh. 1. S. Nr. 6.

<sup>h</sup> C. Thomasius de iure consuet. et observantiae. Hal. 1699. C. C. Hbfacker de iure consuet. Tub. 1774. Meurer jur. Abh. u. Beobacht. 1. Nr. 4. 5. 6. J. N. K. Guilleaume Abh. d. Rechtslehre v. d. Gewohnheit. Osnabr. 1801. (Hübner) Bericht. u. Zusätze zu den Inst. des R. R. § 12. K. H. L. Volkmar Beytr. zur Theorie des G. R. Braunschweig 1806. Dabelow v. der Verjährung. 2. B. 108—134. C. C. W. Klötzer Vers. eines Beitrags zur Revision der Theorie vom Gewohnheitsrecht. Jena 1813. Archiv für civilist. Prax. 3. B. Nr. 18.

When certain persons have by common consent purposely<sup>i</sup> followed a certain rule, and have, whether by acts or forbearances (*consuetudo affirmativa, negativa*), recognised such rule as binding upon them, there arises from this common will so evidenced a law which obliges every individual who can be reckoned as one of these persons,<sup>k</sup> provided the custom be not unreasonable,<sup>l</sup> and provided also it relate to those matters to which the written law does not apply (*consuetudo constitutiva*). Customs which are opposed to written law (*correctoriæ, derogatoriæ*) are held by Roman jurists to be invalid, unless they have been specially confirmed by the supreme power of the state,<sup>m</sup> or have existed immemorially:<sup>n</sup> and it is immaterial whether they consist in a mere non-observance of the written law (*desuetudo*), or in the observance of new principles opposed to such law (*consuetudines abrogatoriæ*);<sup>o</sup>

E. F. E. Schmidt *Vers. einer Theorie des Gewohnheitsrechts*. Leipz. 1825. Perfectly new views are advanced by G. F. Puchta *das Gewohnheitsr.* 2 Bde. Erlang. 1828. 1837. u. Savigny *System* § 28—30. Against them see J. F. Kierulff *Theorie des gemeinen Civilrechts*. Altona 1839. B. 1. § 2, and on the difference between them and those commonly held Hänsel *Institutionen* B. 1. 340—359.

<sup>i</sup> See as to the so called *opinio necessitatis* Klötzer *loc. cit.* 189—214. Schweppe *Röm. Priv. R.* 1. B. § 33a. 35.

<sup>k</sup> § 9. I. de iure nat. (1. 2.) pr. I. de aquis. per arrog. (3. 11.) L. 32—38. de I.L. (1. 3.) L. 8. de R. N. (23. 2.) L. 1. § 15. de inspic. ventre (25. 4.) L. 2. C. quæ sit long. consu. (8. 53.).

<sup>l</sup> Nov. 134. c. 1. cap. 11. X. de consuet. (1. 4.) cap. 1. de constit. in 6. (1. 2.) G. A. Struv de consuet. rationab. et irrationab. Ien. 1667.

<sup>m</sup> L. 32. § 1. de LL. (1. 3.).

<sup>n</sup> According to the common opinion immemorial custom though opposed to written law is valid. See § 197.

<sup>o</sup> L. 38. compared with L. 39. de LL. (1. 3.) L. 2. C. quæ sit l. consu. (8. 53.) L. 5. C. de LL. (1. 14.). Opinions are very much opposed as to this. Cocceii I. C. L. 1. T. 3. qu. 4. F. C. Conradi de consuet. legem haud vincente. Helmst. 1745. Hübner *loc. cit.* 164—169. C. G. Schweitzer de desuetudine. Lips. 1801. Schöman Handb. 1. B. 56—64. Klötzer 85—126. Vangerow *Leitfaden für Pandekten-Vorlesungen* B. 1. § 16. Many are of a different opinion, see G. H. Ayer de consuet. legem vincente. Goetting. 1763. Glück *Pand.* Bd. 1. § 93. Gesterding im *Arch. für civ. Prax.* 3. Bd. 271—283. Schmidt *loc. cit.* 7—50. Seuffert im *Arch. f. civ. Prax.* 11. Bd. 357—365. Puchta *loc. cit.* 81—91, 117, 118. Fritz *Erläuterungen*, 1. Hft. 36—38. The contrary is the case by the common law cap. 3. 8. 11. X. de consuet. (1. 4.) cap. 1. 2. 3. eod. in 6. (1. 4.). See *contra* Klötzer 104—120. Schmidt *loc.*

and it is also immaterial whether the customs have or have not been confirmed by judicial decisions.<sup>p</sup>

### § 18.

**Its Requisites.**<sup>q</sup>—Besides the above-mentioned negative requisites, every valid custom presupposes a rule which the majority<sup>r</sup> at least of a certain class of persons have observed as binding, and that not secretly,<sup>s</sup> but by an, on the whole, unbroken<sup>u</sup> series of similar<sup>t</sup> acts. It is impossible to state how many such acts are necessary to the validity of a custom; <sup>x</sup> this question, however, is not to be left to the mere fancy of the judge,<sup>y</sup> but he must endeavour in each particular case to ascertain whether from the number of acts an intention common to the class of persons in question can be fairly inferred.

### § 19.

**Its Legal Force.**—A custom with the above requisites does not require, in order to become binding, any *special* recognition from the supreme power,<sup>z</sup> or confirmation by judicial decision,<sup>a</sup> or

*cit.* 57—76. Savigny System Bd. 1. § 13. 18. 25. 30. Archiv f. civ. Prax. B. 27. Nr. 8.

<sup>p</sup> See however Leyser spec. 9. m. 10. compared with Hartleben spec. 11. med. 10. Müller ad Leyser Obs. 37.

<sup>q</sup> Froben on this §. Savigny System B. 1. § 29. Weiske Rechtslexikon B. 4. p. 842.

<sup>r</sup> Lauterbach coll. L. 1. T. 3. § 33.

<sup>s</sup> Klötzer p. 182—188.

<sup>t</sup> L. 1. C. h. t. (8. 53.) See too Glück Pand. Bd. 1. § 87.

<sup>u</sup> L. 3. C. 1. c.

<sup>x</sup> Some others think differently. See Köchy Medit. 1. Nr. 8. Meditat. über versch. R. M. 3. B. Nr. 182.

<sup>y</sup> See *contra* the authorities just cited and Glück Pand. Bd. 1. § 86. Klötzer 164—172.

<sup>z</sup> cap. 1. de constitut. in 6. (1. 2.) Weber Reflexionen (Versuche 1. B. Nr. 1.) § 24. Klötzer 38—85. Against this L. 32. de LL. (1. 3.) is frequently cited, but without reason. See however Sehöman Handb. 1. B. 28—56. Even the general assent of the supreme power is held to be unnecessary by Mühlenbruch Pand. Bd. 1. § 38. Note 15. Schweppe Röm. Priv. R. 1. B. § 34.; to this however we may say what ought to be should not be confounded with what is.

<sup>a</sup> L. 34. de LL. (1. 3.) is not inconsistent with this, neither are L. 3. C. de aedific. priv. (8. 10.) L. 1. C. quae sit long. cons. (8. 53.). Cramer Obs. iur. un. T. 3. Obs. 847. Meditationen üb. versch. R. M. 3. B. Nr. 183.

the lapse of a *long*, determinate or indeterminate, period of time,<sup>b</sup> still less of the time requisite in cases of prescription.<sup>c</sup> Nevertheless, by lapse of time the existence of the common will is more easily placed beyond doubt, and it may be considered as established by a regular judicial decision.<sup>d</sup> For this last reason, judicial decisions which are distinguished from customary law by our jurists and the Romans,<sup>e</sup> may, to a certain extent, be considered a species of it.<sup>f</sup> It is not, moreover, absolutely essential that all the acts should be precisely similar; for this is not required by any law,<sup>g</sup> and a common intention and practice may easily exist notwithstanding some few exceptional cases.

### § 20

**Proof of Customs.**—In order to prove the existence of a custom<sup>h</sup> it is only necessary to show the existence of its positive requisites (§ 18). It is for those who deny the custom to show that it is unreasonable, contrary to law, or has been interrupted.<sup>i</sup> Ordinary evidence is admissible in these cases. Consequently—*documents*, provided they are of themselves admissible in evidence, and

Klötzer 143—164. Volkmar *loc. cit.* § 44. Savigny System B. 1. § 25. See however Meurer *ubi sup.* 125. Hofacker Diss. cit. cap. 2. § 38., and as to modifying customs Wernher P. 9. Obs. 193. Kind qu. for. T. 1. c. 38.

<sup>b</sup> Volkmar *ubi supra* § 33—40., as is generally but erroneously supposed from L. 32. 33. 35. de LL. (1. 3.). L. 2. 3. C. eod. (8. 53.). See other views in Mediat. über versch. R. M. 3. B. Nr. 182. H. G. Bauer de ver. iuris consuet. ratione lapsuque tempor. ad illud introduc. necess. Lips. 1761.

<sup>c</sup> Others think differently in consequence of cap. ult. X. de consuet. (1. 4.) cap. 3. eod. in 6. (1. 4.). But see Meurer *ubi sup.* 157.

<sup>d</sup> L. 1. C. quae sit. long. consu. (8. 53.).

<sup>e</sup> L. 38. de LL. (1. 3.).

<sup>f</sup> L. 34. eod. L. 1. C. cit. Hofacker princ. T. 1. § 124. See *contra* Klötzer 287—296.

<sup>g</sup> L. 3. § 6. de testib. (22. 5.). Klötzer p. 173—181. The contrary is generally supposed on account of L. 38. de LL. (1. 3.) L. 1. 3. C. h. t. (8. 53.) L. 3. C. de aedific. priv. (8. 10.). But these passages, to say the most, only refer to judicial decisions, if, in fact, to them. Schweppe, *ubi supra*, B. 1. § 36.

<sup>h</sup> D. H. Kemmerich de probat. consuet. et observantiae. Ien. 1732. 1746. 1773. Gaertner med. Sp. 1. m. 12. Pütter Beitr. 2. Th. Nr. 39. Cocceii I. C. L. 1. T. 3. qu. 15. Savigny System B. 1. § 30.

<sup>i</sup> Kemmerich l. c. Sect. 2. § 6.

particularly relate to the disputed facts;<sup>k</sup> *witnesses* who are intimately acquainted with the custom<sup>l</sup> and who need not exceed two in number, if they can testify to as many facts as happen to be required;<sup>m</sup> *oaths*, namely, the suppletory oath, provided the person giving evidence is acquainted with the necessary facts,<sup>n</sup> and also the *juramentum delatum*.<sup>o</sup> Evidence, however, of this kind ought not to be afterwards used against a third party.<sup>p</sup>

Customs which are notorious and with which the tribunal is acquainted, require no proof.<sup>q</sup>

### C. OTHER SORTS OF UNWRITTEN LAW.

#### § 21.

In addition to the above, we may here mention all testamentary dispositions, all those rules which a *pater familias* may set to his children, and also the laws of societies. The last require further notice.

#### § 22.

The majority of any number of persons associated for a determinate purpose, whether they form a mere society or are endowed with the rights of a corporation (§ 109, 113), have the power of binding themselves by conventional rules (*statuta conventionalia*); and such rules are valid without any special consent proceeding from the supreme power of the state,<sup>r</sup> provided they do not conflict with those laws of the state which are

<sup>k</sup> Wernher P. 4. Obs. 110. Mevius P. 4. Dec. 2. Struben 2. Th. 59. Bd. Hartleben med. ad Pand. Sp. 11. med. 13. But see Leyser Sp. 9. m. 9. Müller ad Leyser T. 1. Obs. 36.

<sup>l</sup> Kemmerich l. c. § 17. Pufendorf T. 2. Obs. 138.

<sup>m</sup> Glück Pand. B. 1. § 87. More are thought necessary by Kemmerich l. c. Voet L. 1. T. 3. § 34.

<sup>n</sup> Kemmerich l. c. § 17. See *contra* Voet l. c. § 33. Struben 4. B. 163. Bd. An oath of belief is thought by many to be sufficient. Wernher P. 1. Obs. 38.

<sup>o</sup> See *contra* Malblanc de iure-iur. § 44.

<sup>p</sup> Tit. C. inter alios acta (7. 60.), compared with Seuffert Erört. einzeln Lehren. Abth. 1. p. 30. 31.

<sup>q</sup> Göüner Handb. d. Proc. 3. B. 32. Abh. § 11. Martin and Walch Mag. f. d. Proc. 1. B. 85. 86.

<sup>r</sup> I. H. Boehmer de natur. statutor. (Exerc. ad P. T. 1.). Majer's Autonomie, 2. St. § 64—68.

unalterable by its individual members.\* In order that the rules of any society may alter such laws as those last mentioned, or in order that their rules may be binding on third parties (*statuta legalia*), it is necessary that the special permission of the supreme power to that effect be obtained.<sup>†</sup> The legality of regulations made by municipal authorities relating to matters of police depends consequently upon the fact that those authorities are not merely heads of the municipality, but representatives of the supreme executive power."<sup>‡</sup>

### § 23.

Conventional unwritten law consists of as many and various rules as there are binding agreements of the nature mentioned (§ 15). Its limits are deducible from the fundamental doctrines relating to agreements hereafter to be examined. The unwritten laws which are set by individual members of a state to themselves or others are usually called *autonomical* laws.<sup>§</sup>

\* Müller ad Leyser Obs. 22. 26. Riccius v. Stadtges. 2. Bd. 6. Hptst.

† Riccius 16. Hptst. § 10, *et seq.*

‡ Riccius 5. Hptst.

§ Pütter Beitr. 2. B. Nr. 21. Majer Autonomie. 1. St. § 23. Weiske Rechtslexikon B. 1. 539. Hänsel Institutionen B. 1. p. 364.

## CHAPTER III.

## OF THE BINDING POWER OF LAWS.

## 1. In general.

## § 24.

As rights and duties are inseparable (§ 1) every law which is compulsory (*jus cogens*) is also permissive (*jus permissivum*): and a law of either description, whether commanding something to be done or not to be done (*jus præceptivum v. prohibitivum*) may be either absolute (*absolute*) or qualified (*secundum quid*). A permissive law which is not compulsory, and a compulsory law which is not permissive, can no more be imagined than a duty without its correlative right, and *vice versâ*: but yet the adjectives compulsory and permissive may be conveniently applied to a law according as compulsion or permission appears to have been the *immediate* object which the lawgiver had in view.<sup>y</sup> When a law is duly conformed to, *Justice* is said to be done,<sup>z</sup> and as there may of course be justice both when the strict letter of the law is followed, and when regard is paid to the surrounding circumstances, the old scholastic writers were induced, to the great confusion of the ideas of themselves and their readers, to divide *Justitia* into two classes, *commutativa* (absolute) and *distributiva* (relative, qualified)<sup>a</sup>

<sup>y</sup> Much that is good and bad has been written upon this. See Cocceii ius contr. L. 1. T. 1. qu. 5.

<sup>z</sup> The moderns name it *externa, expletiva*, as opposed to non-compulsory and merely moral justice, which they call *interna, attributiva*. The definition in the Corpus Juris, L. 10. pr. de just. et jur. (I. 1.) refers rather to the latter; it has been defended by Welcker, Rechts &c., Lehre, p. 544—552, and by Warnkönig, Rechts. philosophie, § 82—84.

<sup>a</sup> Compare Polack mathes. for. Cap. 2. Nr. 1. Averanii interpret. L. 3. c. 6. Leyser Spec. I. med. 8.

## 2. Of the time from which Laws are binding.

### § 25.

The binding power of Positive laws can commence only from the moment when the event which gives them birth is complete and perfected. Written laws, therefore, become binding from the moment of their promulgation,<sup>b</sup> and not before; but they do not necessarily become binding immediately after promulgation if the time from which they are to take effect be deferred by the law giving power,<sup>c</sup> or if he on whom they are intended to be binding can prove an excusable ignorance of the fact of their publication.<sup>d</sup> Although the judicial authorities are bound of their own accord to make themselves acquainted with the promulgation of the written laws as with the existence of the customs of the country over which they have jurisdiction,<sup>e</sup> yet the fact of promulgation must, if disputed, be proved like any other fact, and that moreover for all places in which the law is to be binding;<sup>f</sup> but when the fact of publication is proved, it is not necessary to prove further that the law has begun to operate.<sup>g</sup>

## 3. Of the events to which Laws are applicable.

### § 26.

When the time for a law to take effect has arrived it becomes applicable only to future, not to past transactions<sup>h</sup>—i.e. not to those by which a right has already been acquired;<sup>i</sup> but yet when

<sup>b</sup> L. 65. C. de decurion. (10. 31). The opinion of Stryk U. M. L. 1. T. 3. § 15. & Cocceii I. C. eod. Tit. qu. 8., that on account of Nov. 66. c. 1. a law in cases of doubt takes effect two months later is incorrect. Wernher P. 4. Obs. 201. Leyser Spec. 7. med. 8.

<sup>c</sup> As, for example, in Nov. 58. Nov. 116. cap. 1.

<sup>d</sup> Nov. c6. c. 1. Faber in Cod. L. 1. Tit. 5. Def. 3. Riccius v. Stadt-gesetzen. 2. Bd. 7. Hptst. § 3.

<sup>e</sup> Weber v. d. Beweisführung Nr. 21. 22. Puchta Gewohnheitsr. 1. Bd. 107—112.

<sup>f</sup> Müller ad Leyser Obs. 14. Hartleben med. Sp. 8. Gärtner med. Sp. 1. m. 9. Of a different opinion is Leyser Sp. 7. m. 1. 2. and Vol. 12. Sp. 7. m. 6.

<sup>g</sup> Riccius *ubi supra*. 2. B. 8. Hptst.

<sup>h</sup> L. 7. C. de LL. (1. 14). See Froben on this §.

<sup>i</sup> L. 17. C. de fide instr. (4. 21.) L. 29. in f. C. de testament. (6. 23.) L. 65. C. de decurion. (10. 31.) L. 23. § ult. C. mandat. (4. 35.) L. ult. C. de pact.



one law is passed to explain the meaning of another, the former must be considered as relating back to the time of the publication of the latter.<sup>k</sup> If it be expressly declared in a law that it shall be retrospective in its action it must have this effect, but even then such transactions as have been brought to a close by agreement, payment, or judgment,<sup>l</sup> as well as those causes in which an appeal from a former judgment is pending,<sup>m</sup> must be governed by the old laws.

pignor. (8. 35.) L. un. § 15. C. de caduc. (6. 51.) L. 12. C. de suis (6. 55.) Nov. 18. c. 5. Nov. 22. c. 46. 47. Nov. 54. c. 1. Nov. 68. c. 1. Nov. 73. c. 9. Nov. 76. c. 1. Nov. 89. c. 7. Nov. 98. c. 1. Nov. 99. c. 1. Nov. 118. c. 6. Nov. 158. praef. (ungl.) The arbitrary L. 27. pr. C. de usuris (4. 32.) has nevertheless caused considerable difference of opinion upon this head. Compare N. C. Lyncker de vi legis in praeteritum. Ienae 1681. 1751. Th. 5. Reinharth ad Christinaeum Vol. 1. Obs. 49. n. 5. Huber prael. L. 1. T. 3. § 10. Müller ad Leyser Obs. 15. Gönner Archiv 1. Bd. 1. Hft. Nr. 10. Chabot de L'Allier questions transitoires. Paris 1809. 2. B. 4. Sirey Journ. 1809. II. 277. und Bibl. du Barreau, 1809. I. 97. Ueber die zurückwirkende Kraft der Gesetze, aus dem Franz. v. Blondeau. Düsseldorf, 1810. Pfeiffer Rechtsf. Hannov. 1810. 1. 2. Hft. Germania. 3. B. 1—3. Hft. Nr. XVI. A. D. Weber über die Rückanwendung positiver Gesetze. Hannov. 1811. C. C. J. v. Herrestorff über die zurückwirkende Kraft der Gesetze. Düsseldorf, 1812. verbessert Frankfurt, 1815. C. G. Overbeck über die Fortdauer der Gültigkeit älterer Hypotheken auf Mobilien. Hamb. 1812. Zeller über Fortwirkung der alten Statute auf Güterverhältnisse und Erbschaften. Heilbronn 1813. Rehberg über den Cod. Nap. 62—90. T. Wiesen über die rückwirkende Kraft der Gesetze. Frankf. 1814. J. N. Borst über die Anwendung neuer Gesetze auf früher entstandene Rechtsverhältnisse. Bamberg 1814. F. K. v. Strombeck Beiträge. Götting. 1816. Nudhart Controversen im Cod. Nap. 1. B. 11—220. F. Bergmann das Verbot der rückwirkenden Kraft der Gesetze. Hannov. 1818. J. S. Verburg de lege ad praeteritum non trahenda. Lugdun. Bat. 1828. F. A. von Zu-Rhein Beiträge. München 1826. 1. Hft. Nr. 2. Mittermaier im Archiv für civ. Prax. 10. B. Nr. 4. G. v. Struve über die Anwendung neuer Gesetze. Götting. 1831. Linde Zeitschr. 5. Bd. Nr. 10. Fritz Erläuterungen 1. Hft. 41—44. Vangerow Leitfaden § 26.

<sup>k</sup> Nov. 19. praef in f. Lyncker l. c. T. 39—42. Voet L. 1. T. 3. § 17. Leyser Sp. 7. m. 6. v. Berg Beobacht. 4. B. Nr. 10. Bergmann 60—64. 196—203. Grolman u. Löhr Magaz. 4. B. 2. 3. Hft. 265—283. See for a somewhat different view die Bericht. u. Zus. zu den Inst. des R. R. 174. 175. Hufeland Geist des Röm. R. 1. Thl. 52—60.

<sup>l</sup> L. 21. in f. L. 22. § 1. C. de SS. eccl. (1. 2.) L. un. § 4. C. de contract. iudic. (1. 53.) L. ult. § 5. C. de legit. hered. (6. 58.) L. 17. C. de fide instrum. (4. 21.) Nov. 19. praef.

<sup>m</sup> Of a different opinion and against Nov. 115. cap. 1., is Glück Pand. B. 1. § 31.

## 4. On whom Laws are binding.

## § 27.

Laws promulgated by the supreme power of a state are binding throughout the whole of such state, and are applicable as well to persons as to things. Those who are subject generally to that supreme power are everywhere bound by such laws; but foreigners are only bound thereby so long as they remain in that state, and as regards the transactions entered into by them whilst there.<sup>n</sup> In cases of doubt moveable things must be governed by the laws to which their owner is himself personally subject.<sup>o</sup> The extent to which any particular unwritten law is binding must of course depend on its own special nature.

## § 28.

The sovereign, so far as his private is distinguishable from his public capacity, is, according to the general opinion, subject *as a private person* to the laws emanating from himself;<sup>p</sup> but it is otherwise if he has expressly excepted himself from their operation, or if by including him the rights of private individuals would be prejudiced, or those of his subjects generally be interfered with. It must not be forgotten, however, that if the sovereign be supreme, no compulsion can be legally employed against him, in case he does not obey such laws.<sup>q</sup> The Roman law declares the reigning person not bound by his laws,<sup>r</sup> although the Emperors, in point of fact, often subjected themselves to them.<sup>r</sup> The same principle was formerly considered to be applicable to the Emperors

<sup>n</sup> See below § 38. *Sintenis Civilrecht*. B. 1. § 7.

<sup>o</sup> *Riccus v. Stadtges.* 17. Hptst. § 1. 2. 8.

<sup>p</sup> *Sintenis ubi supra*. Note 47.

<sup>q</sup> Compare Wachendorf de principe legib. soluto (in eius Diss. triade. Ultr. 1730.). Schnaubert de principe legib. soluto. Ien. 1793, translated with notes by v. Hagemester under the title: Auch der Regent ist an die von ihm gegebenen Ges. gebunden. Rost. u. Leipz. 1795. Gött. gel. Anzeige 1795. 83.

<sup>r</sup> § ult. I. quib. mod. test. infirm. (2. 17.) L. 4. L. 10. C. de LL. (1. 14.) L. un. § 14. C. de caduc. toll. (6. 51.).

<sup>r</sup> L. 31. de LL. (1. 3.) Nov. 105. cap. 2. § 4. Huber Digress. L. 1. c. 18. 35.

of Germany,<sup>1</sup> whilst territorial Princes were, subject to the above qualification, bound by their own laws.<sup>2</sup>

### 5. Effect of ignorance and mistake.

#### § 29.

Every subject is bound to be acquainted with, and to conform to, all laws duly promulgated.<sup>3</sup> Nevertheless cases may occur in which an error (whether consisting of ignorance or mistake, for that is immaterial<sup>4</sup>) as to law or fact may be legally excusable.<sup>5</sup>

I. With respect to ignorance or mistake concerning law;

1. It is a general principle that he who might have made himself acquainted with the law, but did not, must bear all the consequences of his ignorance, should they even extend so far as to deprive him of property already acquired by him.<sup>6</sup> If, however, his ignorance be excusable, which he must prove, then—

A. If he seeks<sup>7</sup> to make a positive acquisition, he cannot, as a general rule,<sup>8</sup> take advantage of his ignorance or mistake; as for example, if he has neglected to observe some essential legal form, or has been party to some illegal transaction, or has allowed a judgment to obtain legal force.<sup>9</sup>

B. If he seeks to avoid a loss, he is not prejudiced by

<sup>1</sup> Gönner Handb. des Proc. 2. B. 39. 40.

<sup>2</sup> See the authorities cited in note (q).

<sup>3</sup> L. 9. C. de LL. (1. 14.) L. 12. C. h. r. (1. 18.).

<sup>4</sup> L. 1. L. 9. § 5. h. t. (22. 6.) L. 57. de O. et A. (44. 7.).

<sup>5</sup> Compare G. L. Boehmer de iur. et fact. ignor. Goett. 1745. Reinhardt v. der iur. u. facti ignor. (in his kl. Schr. 1. St. Nr. 3.). F. C. Hermann v. d. Wirkungen des Irrthums. Wetzlar 1811. Hufeland Geist des Röm. R. 1. Th. 231—241. Grolman u. Löhr Magaz. 4. B. Nr. 4. Archiv für civilist. Prax. 2. B. Nr. 35. Glück Pand. 22. B. 262—374. Seuffert Erört. einz. Lehren. Abth. 1. Nr. 11.

<sup>6</sup> L. 9. § 3. de iur. et fact. ignor. (22. 6.) L. 9. C. de legib. (1. 14.) Wernher lect. com. eod. Tit. § 4. See however Leyser Sp. 189. M. 3. Müller ad Leyser Obs. 506. Kritz Rechtsfälle. Leipz. 1833. B. 1. Nr. 16.

<sup>7</sup> This distinction is not approved by Savigny who relies upon L. 25. § 6. do her. pet. (5. 3.) Savigny System B. 3. Beilage VIII. Nr. 22.

<sup>8</sup> L. 7. L. 8. h. t. (22. 6.) L. 11. C. eod. (1. 18.). An exception, which Huber Prael. L. 22. T. 6. § 2. carries too far, is contained in L. 10. de B. P. (37. 1.) L. 6. 8. C. qui admitti (6. 9.).

<sup>9</sup> L. 56. de re iudic. (42. 1.) L. 1. C. de interd. matr. (5. 6.). Archiv für civil. Prax. 2. B. 363—378.

ignorance or mistake on his part,<sup>c</sup> and this is true to such an extent, that he may even recover back a sum of money not owing, but paid by him in excusable ignorance of the law.<sup>f</sup>

2. To these general principles there are the following exceptions;<sup>g</sup>

Minors, if not publicly authorised to engage in business,<sup>h</sup> are not, even so far as regards positive gain,<sup>i</sup> prejudiced by their ignorance, and they need not prove it excusable.

Soldiers, whose ignorance also need not be proved excusable, are not prejudiced by ignorance, at least in seeking to avoid a loss;<sup>k</sup>

So the ignorance of some persons is, in seeking to avoid a loss, excused on account of their simple habits and want of education<sup>l</sup> (*rusticitas*); and, lastly,

Women are not in some cases required to prove their ignorance

<sup>c</sup> L. 3. L. 4. L. 7. 8. 9. eod. L. 7. § 4. de iurisd. (2. 1.) L. 1. § ult. de edend. (2. 13.).

<sup>f</sup> L. 3. pr. ad SCt. Maced. (14. 6.) L. 10. C. de iur. et fact. ignor. (1. 18.) L. 2. C. si adv. sol. (2. 33.) compared with L. 14. L. 26. § 12. L. 38. 40. 54. 59. de cond. indeb. (12. 6.) L. 5. C. eod. (4. 5.) und L. 7. L. 9. § 5. h. t. (22. 6.) See for the different opinions upon this subject Glück Pand. 13. B. 135—152. Hermann *ubi supra* § 8. Cocceii I. C. Lib. XII. T. 6. qu. 14. Vangerow Leitfaden B. 1. § 83. Anm. 2. Many persons do not take the view above expressed, see: Höpfner Comment. § 954. Note 2. F. Alef de eo quod iust. est circa iuris et facti ignor. Heidelb. 1747. § 35 &c. Savigny System B. 3. Beilage VIII. Nr. 35—39. H. R. Claussen in der Schleswiger jurist. Zeitschr. Jahrg. 1844. 164—257.

<sup>g</sup> The presumption in favour of excusable ignorance in the following persons must be rebutted by evidence adduced by their opponents: L. 2. C. de in ius voc. (2. 2.).

<sup>h</sup> Such persons, except as to the business in which they are authorised to engage, are to be treated like other minors. Burchardi Wiedereinsetzung in d. vorigen Stand. 223. 224.

<sup>i</sup> L. 9. pr. de iur. et fact. ign. (22. 6.) L. 2. L. 11. C. eod. (1. 18.) L. 38. § 7. ad L. Iul. de adult. (48. 5.) L. 4. C. de incest. nupt. (5. 5.). L. 8. C. de in int. (2. 22.) L. 2. C. si adv. del. (2. 35.) L. 9. § 5. de minor. (4. 4.). Lauterbach coll. L. 22. T. 6. § 14. Vangerow *ubi supra*, § 83. Anm. 1.

<sup>k</sup> L. 25. § 1. de probat. (22. 3.) L. 9. § 1. h. t. (22. 6.) L. 1. C. h. t. (1. 18.) L. 1. C. de rest. mil. (2. 51.) L. 22. pr. § 15. C. de iure delib. (6. 30.) L. 5. C. de his qui sibi (9. 23.). Markart exero. II. c. 3. § 3. goes, on the whole, somewhat further. Savigny *ubi supra* 439 explains the modern application of this principle.

<sup>l</sup> L. 25. § 1. de probat. (22. 3.) L. 7. § 4. de iurisd. (2. 1.) L. 1. § 5. de edendo

excusable;<sup>m</sup> for example, in certain crimes,<sup>n</sup> in recovering money paid when not due,<sup>o</sup> and in case persons legally incapable of being sureties are accepted as such by them in a civil suit.<sup>p</sup>

These three last classes of persons do not cease to form exceptions to the general rule, by the mere fact that they might have acquired knowledge, but the case is different if they have heedlessly shunned it.<sup>q</sup>

II. With respect to ignorance or mistake concerning matters of fact, it is a general rule, that ignorance of a person's own affairs is always prejudicial to him, unless he can show that it was excusable;<sup>r</sup> but ignorance of other circumstances is never prejudicial unless it can be shown to result from gross negligence.<sup>s</sup> As there are no special laws relating to the proof of ignorance, he who seeks to avail himself of it must prove its existence by such evidence as is applicable to ordinary cases; his oath alone is consequently not sufficient.<sup>t</sup>

(2. 13.) L. 3. § 22. ad SCt. Silan. (29. 5.) L. 2. § 1. si quis in ius (2. 5.) L. 8. C. qui admitti (6. 9.) L. 2. C. de in ius voc. (2. 2.) L. 1. C. de interd. matr. (5. 6.). These cases are considered impracticable by Sintenis Civilrecht B. 1. § 8. Note 8.

<sup>m</sup> L. 9. pr. h. t. (22. 6.) L. 13. C. eod. (1. 18.) L. 1. § 5. de edendo (2. 13.). Savigny *ubi supra*. Nr. 31. See however Markart l. c. c. 3. § 3. Huber l. c. § 2.

<sup>n</sup> L. 2. § 1. de inspic. ventre (25. 4.) L. 38. § 2. 4. ad L. Iul. de adult. (48. 5.) L. 15. § 5. ad L. Corn. de fals. (48. 10.) L. 1. § 10. L. 4. pr. ad SCt. Turpill. (48. 16.) L. 4. C. de incest. nupt. (5. 5.).

<sup>o</sup> L. 25. § 1. de probat. (22. 3.) L. 5. C. de pact. (2. 3.) L. 9. C. ad SCt. Vell. (4. 29.).

<sup>p</sup> L. 8. § 2. quid satisd. cog. (2. 8.). Cuiac. Obs. L. 14. c. 39.

<sup>q</sup> See as to the different opinions upon this, Leyser Sp. 289. m. 4. 5. Müller ad Leyser Obs. 507. Struben 3. B. 109. Bed. Hommel Rhaps. Obs. 477. Savigny *ubi supra*, Nr. 29—33.

<sup>r</sup> L. 6. L. 7. ad SCt. Velleian. (16. 1.) L. 22. pr. de cond. indeb. (12. 6.) L. 2. L. 6. L. 9. § 2. h. t. (22. 6.) L. 5. § 1. pro suo (41. 10.). Crell de ignorantia facti proprii interdum innocua. Vitemb. 1771.

<sup>s</sup> L. 3. L. 6. L. 9. § 2. h. t. (22. 6.) L. 3. pr. ad SCtum Mac. (14. 6.). L. 14. § 10. L. 55. de aedil. ed. (21. 1.). L. 4. quod vi (43. 24.).

<sup>t</sup> Thibaut Vers. 2. Bd. p. 126—129. See however Löhr in his Magaz. 4. B. 53—56. who cites cap. 4. X. de except. (2. 25.) cap. 6. X. qui matr. accus. (4. 18.) cap. 4. X. de sentent. excomm. (5. 39.) cap. 8. de elect. in VI. (1. 6.) *contra* K. Röder Abhandlungen. Giess. 1833. Nr. 3.

## CHAPTER IV.

## OF THE EXTENT OF LAWS.

## § 30.

**In general.**—Laws, considered with reference to the extent of their application, are either

I. General (*generales*), which lay down a rule obliging generally; or

II. Special (*speciales*), which are applicable only to individual cases and persons. These again are either

1. No exception to the general laws, e.g. instructions relating to matters of government: or

2. Exceptions thereto. Special laws of this description are called *privilegia*, or *constitutiones personales*.<sup>1</sup> The term *privilegium* is, however, often confined by modern jurists to laws by which a person is excepted from the common rule, not in any particular case only, but for several cases.<sup>2</sup>

## § 31.

**Of Privilegia.**—*Privilegia* may be either prejudicial or advantageous to a person (*privilegia odiosa* and *favorabilia, beneficia*),<sup>3</sup> and, as may be conceived, in a great variety of ways.<sup>2</sup> They can be acquired by means of an express or an implied contract,

<sup>1</sup> § 6. I. de iure nat. (1. 2.) L. 1. § 2. de const. princ. (1. 4.). See generally Gebauer *singularia de privilegiis*. Goett. 1740. (Exerc. T. 1.) G. F. Wasmuth de *priv. natura et in specie de mod. quibus finiuntur et amitt.* Goett. 1787. Hufeland über den Geist des R. R. 1. B. 211—299. *Privilegia* and *Jura singularia* are often used indiscriminately. L. 40. L. 42. L. 44. § 1. de admin. tut. (26. 7.) L. 24. § 2. 3. L. 32. de reb. auct. ind. (42. 5.).

<sup>2</sup> See Thibaut Vers. 2. B. Nr. 13.

<sup>3</sup> L. 1. § 2. ad municip. (50. 1.).

<sup>2</sup> For example, *exasperatio poenae*, *dispensatio*, *mitigatio poenae*, *aggratiatio*, *abolitio*. I. S. Stryk de *abolitione principis*. Hal. 1695.

or even without any contract at all.<sup>a</sup> *Privilegia* confined strictly to a man's person are called *in personam*, or in modern times *personalia*; those, on the other hand, which are annexed to some right, and in consequence extend to such persons as are collaterally interested therein, or who succeed to it,<sup>b</sup> or are the heirs of the person to whom the privileges are granted, are called *in rem* or *realia*.<sup>c</sup> There are no *privilegia mixta*, partaking of the nature of both of these.<sup>d</sup> In cases of doubt, there is no presumption for *privilegia realia*.<sup>e</sup>

### § 32.

**Who can grant Privilegia.**—*Privilegia* can only be granted by the Sovereign, and never without his permission by any magistrate:<sup>f</sup> a *privilegium* may however affect not only subjects but

<sup>a</sup> Some deny this, Stryk de iure privil. contra privil. cap. 1. § 21—31. Gebauer de privileg. § 19, but without sufficient reason. Wasmuth l. c. cap. 1. § 2. *privilegia non conventionalia* should not be designated *gratiosa*. See I. G. Schaumburg de natura privil. tam gratios. quam conventionalium. Ien. 1756.

<sup>b</sup> If successors generally are mentioned in a *privilegium* it is available for those of women, L. 4. de iure imm. (50. 6.). But see Wening Lehrbuch B. 1. § 30. who relies on L. 1. § 2. eod. But compare Nov. 118.

<sup>c</sup> L. 7. § 1. de except. (44. 1.) L. 1. § 43. 44. de aqua quot. (43. 20.) L. 68. L. 196. de R. I. (50. 17.) L. 3. § 1. de censibus (50. 15.). Toullieu collect. Diss. 15. A *privilegium* annexed to a thing is, *par excellence*, called *reale*, Gebauer l. c. § 16.; but Mevius P. II. Dec. 173. is wrong in calling those real which are granted to a *universitas* and last as long as it, L. 1. § 2. de iure imm. (50. 6.) L. 4. § 3. de cens. (50. 15.) because that might lead one to suppose that such *privilegia* affected the individual members pro rata. See below § 112—115. F. Alef figmentum privilegiorum realium. Heidelb. 1741. by a confusion of terms denies that there are any *privilegia realia*.

<sup>d</sup> As Hert. de transit. privil. ad alios (in opusc. V. 1. T. 3. p. 16.) and others erroneously suppose.

<sup>e</sup> L. 1. § 43. de aqua quotid. (43. 20.) L. 1. § 1. de iure imm. (50. 6.) L. 3. § 1. de censib. (50. 15.) cap. 7. de R. I. in 6. (5. 13.). Opinions differ upon this point. Compare Cocceii I. C. L. 1. T. 4. qu. 4. Wasmuth l. c. cap. 1. § 1. Gebauer § 17. 18. 19. Berger Oec. L. 1. T. 1. Th. 15. Hartleben med. ad P. Sp. 14 m. 5. Voet L. 1. T. 4. n. 14. Walch controvers. p. 20. 21. C. G. Einert Ex. privilegium in dubio magis pro personali, quam reali reputandum. Lips. 1778. L. R. Berner de privilegio in dubio magis pro reali quam pro personali praesumendo. Heidelb. 1817.

<sup>f</sup> Wasmuth l. c. cap. 1. § 3—8.

also foreigners, if they accept it or are compelled to recognise the power of a sovereign other than their own, in consequence either of being themselves or of having property in his dominions.<sup>g</sup>

### § 33.

**Effect of Privilegia.**—Disadvantageous *privilegia* impose duties, advantageous *privilegia* confer rights; and the objects of such duties and rights may be either acts or forbearances (*privilegia affirmativa, negativa*). *Privilegia* are moreover always accompanied by sanctioning rights<sup>h</sup> available against those who oppose their exercise, and, by analogy to *servitudes*, are enforceable by the forms of action which are applicable in case of a disturbance of them.<sup>i</sup> The special effect of any particular *privilegium* depends of course upon its nature, or, if the *privilegium* merely extends a former one (*privilegium ad instar*), upon the nature of the latter.<sup>k</sup> So far however as a *privilegium* injures the acquired rights of a third person it is, in case of any doubt as to its validity, to be considered invalid;<sup>l</sup> and unless it is in the nature of a monopoly the grant of one *privilegium* does not prevent the sovereign from granting a precisely similar *privilegium* to other persons.<sup>m</sup> The doctrines relating to the duration, recall, renunciation, interpretation, collision and transfer of *privilegia* will be explained when the general principles applicable to such matters are being considered.<sup>n</sup>

<sup>g</sup> Compare Wasmuth l. c. § 9. Cocceii I. C. L. 1. T. 4. qu. 5.

<sup>h</sup> But Müller ad Leyser Obs. 44. is without any sufficient reason of a different opinion.

<sup>i</sup> Wasmuth l. c. § 19.

<sup>k</sup> C. A. Rinder de privileg. ad instar. Altorf. 1714.

<sup>l</sup> L. 7. C. de precib. imper. offer. (l. 19.).

<sup>m</sup> Leyser Sp. 10. m. 4. See *contra* Müller l. c. Obs. 43.

<sup>n</sup> See below § 42. 49. 51. 53. 84. 462.



## CHAPTER V.

## OF THE CHARACTER OF LAWS.

## § 34.

IF laws are considered with respect to their character, they are found either to be conformable to natural legal principles, and to promote the general welfare of the state even although they require positive sanctions, or to introduce for political or other reasons, some anomalous rule.<sup>o</sup> In the first case they form what is commonly called *Jus commune*, in the latter *Jus singulare*.<sup>p</sup> *Jus singulare* is often termed *privilegium*, from the fact that this also is a juridical anomaly,<sup>q</sup> (§ 31). Anything which, according to the Roman law, is conformable to the strict rules of law is said to be *Juris communis* or to be *ipso Jure*; opposed to these are the expressions *ope exceptionis* or *tuitione prætoris*,<sup>r</sup> which are used when a person is allowed (as he generally was by the prætor's edict) to rely upon some recognised principle of equity to the exclusion of the strict rules of law.<sup>s</sup> Whatever may have been the distinction between the two expressions *ipso jure* and *ope exceptionis* in early times,<sup>t</sup> it is certain that it did not turn upon the fact that some legal relations arise as it were by them-

<sup>o</sup> Savigny System B. 1. § 16.

<sup>p</sup> L. 14. 15. 16. de LL. (1. 3.) L. 15. de vulg. subst. (28. 6.) L. 141. pr. 162. de R. I. (50. 17.) Hänsel Institutionen B. 1. 394—401.

<sup>q</sup> L. 15. cit. L. 40. 42. 44. § 1. de admin. tut. (26. 7.). Schilling Institutionen B. 2. § 13.

<sup>r</sup> Savigny System B. 1. § 22.

<sup>s</sup> Caius IV. 116—119. L. 1. § 5. quod falso tut. (27. 6.) A. Hummel über die Arten, Verbindlichkeiten aufzuheben. Giess. 1804. Vangerow Leitfaden § 126.

<sup>t</sup> Mühlenbruch Pand. B. 2. § 463.

selves, whilst others do not ;<sup>u</sup> and that it had practically speaking ceased to exist at the time when the classical Jurist Paulus wrote.<sup>x</sup>

<sup>u</sup> L. 8. § 16. de inoffic. test. (5. 2.).

<sup>x</sup> L. 40. de R. C. (12. 1.) L. 112. de R. I. (50. 17.) Noodt de foenore et usuris. L. 3. c. 3. de pact. c. 12. See too below § 395.

## CHAPTER VI.

OF LAWS CONSIDERED WITH RESPECT TO THE MODE IN WHICH  
THEY ARE MADE KNOWN.

—♦—  
§ 35.

**In General**—Laws are either published generally or they are not.

Laws published generally are called, if they are also of general applicability, *edicta*, *leges edictales* or *epistolæ generales*.<sup>7</sup>

Laws specially published are—

1. *Mandata*, or instructions from the sovereign power relating to matters of government and which, being directed to some official person, are to be followed by him generally or only in some special cases (*mandata ordinaria* and *extraordinaria*).<sup>8</sup>

2. *Rescripta*, or answers by the sovereign to questions submitted to him. The Romans divide rescripts into two sorts, according as the questions are submitted by a community or a single person. Rescripts in answer to questions of the first sort, as also to questions relating to public matters, are called *sanctiones pragmaticæ*:<sup>a</sup> rescripts of the other sort are called, if contained in a letter, *epistolæ*, if written on the document containing the question, *subscriptiones* or *adnotationes*.<sup>b</sup> As moreover matters of

<sup>7</sup> L. 1. § 1. de const. princ. (1. 4.) § 6. I. de iur. nat. gent. et civil. (1. 2.) L. 6. C. de secund. nupt. (5. 9.) L. 1. § 2. de fugitivis (11. 4.). Here too belong the *generales formae* of the *Praefecti Praetorio*. Savigny System B. 1. § 24.

<sup>8</sup> L. 1. 2. C. de mandat. princip. (1. 15.). Instructions in private matters are called *epistalmata*. I. 3. C. de quadriennii praeser. (7. 37.). I. H. Boehmer D. de iure epistalmatis. Hal. 1735.

<sup>a</sup> Const. *Summa* § 4. L. 7. § 1. C. de div. rescript. (1. 23.) L. 10. C. de ss. eocl. (1. 2.) L. 2. C. de pet. bon. (10. 12.). Hänsel Institutionen B. 1. 300.

<sup>b</sup> Theoph. ad § 6. I. de iur. nat. (1. 2.) L. 7. C. de div. rescript. (1. 23.) L. 15. C. de prox. sacr. scrin. (12. 19.) L. 1. C. de prec. imper. offer. (1. 19.) L. 1 § 1. de const. princ. (1. 4.) L. 3. L. 5. C. comminat. (7. 57.). The termino-

justice and matters of government may be disposed of by means of rescripts, there is another division into rescripts of justice and rescripts of grace.<sup>c</sup>

3. *Decreta*, or solemn judgments pronounced by the sovereign in cases brought before him on appeal, all the regular legal forms being strictly observed.<sup>d</sup>

4. *Interlocutiones*, or judgments pronounced by the sovereign without any strict observance of the regular legal forms by those appealing to him.<sup>e</sup>

§ 36.

**Their Binding power.**—With respect to the form and binding power of decrees and rescripts, the following principles require notice.

1. Rescripts must be subscribed by or with the name of the Sovereign, and be sealed with his seal; also the date,<sup>f</sup> the facts assumed by the grantor to be true, and the conditions (*clausulas*) under which the rescripts are to remain in force, should be expressed; but it is not usual for the clause, *si preces veritate nitantur*, to be expressly added.<sup>g</sup>

2. The effect of a rescript of justice begins from the moment it reaches the judge, whilst the effect of a rescript of grace begins from the time it is granted.<sup>h</sup>

3. Rescripts which interfere with the welfare of the state or

logy of our Jurists is here, it must be confessed, very various. Compare Schulting pro rescript. imper. Romanor. (op. T. 1.). D. C. Hunthum de rescript. princip. Romanor. Lugd. Bat. 1709. (in Oelrichs Th. D. Belg. Vol. II. T. 3.) I. H. Boehmer de sanct. pragmat. indole (Exerc. T. I.)—L. 1. de const. princ. (1. 4.) L. 32. § 14. de recept. (4. 8.) Const. Hæc quæ de novo Codice fac. § 2. in fin. Peyron Cod. Theod. p. 38. 39. Guyet Abhandl. 39—47.

<sup>c</sup> Textor D. de rescript. grat. et. iustit.

<sup>d</sup> Theophilus ad § I. I. de iur. nat. (1. 2.).

<sup>e</sup> L. 1. § 1. D. de constit. princ. (1. 4.). Huber prael. L. 1. Tit. 2. § 9. They are taken to be interlocutory judgments by Savigny System B. 1. § 23. See Thibaut Vers. 2. B. Nr. 13.

<sup>f</sup> L. 3. 4. 6. C. de divers. reser. (1. 23.).

<sup>g</sup> L. 7. pr. C. l. c. compared with cap. 2. X. de rescript. (1. 3.).

<sup>h</sup> cap. 49. X. de appell. (2. 28.) cap. 7. X. de rescript. (1. 3.). See upon this subject Berger Dec. n. 8. I. H. Boehmer consult. et dec. T. 3. P. 2. Dec. 11. Kind quaest. for. T. 1. cap. 16.

with the acquired rights of strangers are, in cases of doubt, to be treated as invalid.<sup>1</sup>

4. A rescript granted on request (*ad instantiam*) and not spontaneously (*ex arbitrio*) loses its effect if he who applied for it either suppressed true or suggested false facts to obtain it (*exceptio ob- and subreptionis*). And a person who, having applied for, has obtained a rescript must prove the falsity of this *exceptio* in case he might have obtained by ordinary legal proceedings what he actually obtained by means of a rescript, and in case the burden of proof in such legal proceedings would have been upon him; but in all other cases it is for those who dispute the validity of the rescript to show that it was obtained by a *suppressio veri* or *suggestio falsi*.<sup>k</sup>

5. Without being published generally, Decrees, Rescripts, and *Interlocutiones* cannot be generally binding. But, if they are so published, those Decrees and Rescripts which receive an authentic interpretation (§ 44) have a generally binding power; whilst other Rescripts, on the contrary, and *Interlocutiones* are only generally binding if expressly made so.<sup>l</sup>

<sup>1</sup> L. 6. C. si contr. ius vel util. publ. (1. 22.) L. 3. 7. C. de precib. imper. offer. (1. 19.) Nov. 82. cap. 13.

<sup>k</sup> As the J. R. A. § 80 leaves everything to the judge, no other general principle than the above can be laid down. The common opinion is however different; see Boehmer I. E. P. L. 1. T. 3. § 11. A different view is taken by Hofacker princip. I. R. G. T. 1. § 115., as also now by Mühlenbruch Pand. B. 1. § 35, on account of L. 2. C. de ditat. (3. 11.), and again another by C. O. Graebe D. de except. Sub- et Obreptionis earumque probat. Rint. 1788. Compare the author's paper in the Archiv f. civ. Prax. B. 17. Nr. 6. Puchta Cursus B. 2. § 188. Weiske Rechtslexikon B. 3. 754.

<sup>l</sup> L. 2. 3. C. de LL. (1. 14.) compared with L. 12. C. eod. For other views see Zepernick ad Siccama de iudic. centumvir. Append. 7. § 19—21. I. C. Koch de constit. principum. Ien. 1754. Emminghaus ad Cocceii I. C. L. 1. T. 4. qu. 1. not. w. Guyet Abhandl. Nr. 4. Savigny System B. 1. § 24. 27. 47.

## CHAPTER VII.

## OF THE RELATIONS OF LAWS TO EACH OTHER.

## I.—COLLISION OF LAWS OF DIFFERENT DEGREES OF AUTHORITY.

## § 37.

IN order to determine, in cases where laws conflict, to which law preference is to be given, the following principles must be observed :

1. Laws which can stand together do not destroy, but only limit each other's effect.<sup>m</sup>

2. In case of direct collision the earliest must give way to the latest.

3. Home-sprung German laws are of greater authority than adopted laws, and of the former the more general give way to the more particular.<sup>n</sup>

4. The Canon law is to be observed rather than the Roman law, unless in any case it can be shown that the contrary has obtained in practice or that the doctrines of the latter are required to be observed by later laws.<sup>o</sup>

5. The newest parts of the Canon law are to be followed in preference to the older, in case of collision between them.

6. As we have received the Roman laws as compiled by Justinian, we must endeavour to ascertain their comparative

<sup>m</sup> L. 41. de poen. (48. 19.) L. 80 de R. I. (50. 17.).

<sup>n</sup> See above § 13. 14.

<sup>o</sup> C. G. Biener opusc. acad. Lips. 1830. T. 2. nro. 50. Vogel Bestandtheile des Pand. R. 116—127. For the various opinions upon this see Cocceii I. C. Proleg. qu. 7. and Emminghaus in not. ibid. Bericht. u. Zus. zu den Inst. d. R. R. § 14 &c. Schweppe R. Priv. R. 1. B. § 54. Wening Lehrb. 1. B. § 5. Savigny System B. 1. § 42.

worth, as viewed by him.<sup>p</sup> The Novels are consequently to be observed in preference to any other part of the *Corpus Juris civilis*, and of the Novels the latest must be preferred to the others. The Code and Institutes come before the Pandects, not however overruling them, but only showing what parts of them have become historical and obsolete;<sup>q</sup> but the Pandects are to be followed in preference to the Institutes in every case in which it can be shown that the latter contain an unintentional error.<sup>r</sup> In case of conflict between different passages of the Institutes, of the Code, or of the Pandects, the jurist has nothing to guide him in coming to any conclusion as to which passage preference should be given; unless indeed some of them are merely matters of history, of which sort are, in the Code, all older ordinances, which are inconsistent with others of later date.<sup>s</sup>

The Authentics (i.e. the additions by the Glossators to the Code and Institutes and which consist of extracts from the Novels) are preferred to the Code so far as they agree with their sources.<sup>t</sup>

<sup>p</sup> See as to this: Thibaut's civilist. Abh. 79—107. Hufeland über den Geist des Röm. R. 1. Thl. 123—182. G. F. C. Haenlein de officio et potestate interpretis circa antinomias in Pandectis obvias. Erlang. 1817. Grolman u. Löhr Magaz. 3. B. Nr. 7. Fritz Erläuterungen. 1. Hft. 9—17. Schilling Instit. B. 2. § 18. 19.

<sup>q</sup> In this way the common opinion represented by Höpfner Comment. § 16. may be reconciled with that held by H. Giphanius tract. quaest. an C. abroget P.<sup>p</sup> F. Gratian de conciliat. leg. D. et C. (both in Beger Cod. Iustin. illustrationes. Franef. et Lips. 1767. 4.), who place the Code and Pandects on the same level. For other views see Walch controuv. p. 6—9. Mackeldey Lehrbuch § 95 and 96 may be consulted with advantage. Savigny System B. 1. §§ 43—45.

<sup>r</sup> As for example L. 7. § 7. in fin. de acquir. rer. dom. (41. 1.) compared with § 25. I. de rer. divis. (2. 1.). For other examples see Savigny *ubi supra* n. d.

<sup>s</sup> Const. Tanta Circa de conf. Digest. § 15. L. 3. § 20. C. de vet. iur. en. (1. 17.) Nov. 158. cap. 1. comp. with L. 12. § 1. C. de LL. (1. 14.). The editor of the Bericht. und Zusätze zu den Inst. des R. R. 8—14. always follows the latest passage. So too Schöman Handb. 1. B. p. 1—12. and Haenlein *loc. cit.* Boerius Dec. 115. absurdly prefers the fragments from responsis as maturiora, magis digesta atque expensa than those ex commentariis; and with equal absurdity Noodt prob. L. II. c. 2. prefers the latter to the former from a suspicion of corruption.

<sup>t</sup> For only Justinian's laws, not the opinions of the Glossators, are received. Walch controuv. p. 9. 10. Brunquell hist. iur. p. 2. c. 10. § 14. I. I. Scherz de authent. auctorib. et auctoritate. Argent. 1733. in C. F. Zepernick biga libellor. auth. illust. Hal. 1788.

## II.—COLLISION OF LAWS OF EQUAL AUTHORITY.

## § 38.

In case laws of equal authority are inconsistent with each other, the following principles are usually observed in practice.<sup>u</sup>

1. A subject is bound, with respect to all legal relations, by the laws of the *forum*, in which he must in general be sued (the so-called *statuta personalia*)<sup>x</sup> and must even in foreign countries be judged according to such laws, unless they confer upon him a privilege burdensome on the subjects of those countries.<sup>y</sup>

2. In questions relating to the form of procedure (by which is not meant the *modus procedendi*),<sup>z</sup> or to the form and efficacy of any transaction and the consequences resulting from it, or to the criminality of an action, the so-called *statuta mixta*<sup>a</sup> are applicable, i.e. those laws are to be followed which are current where the suit has to be instituted, or where the transaction took place,<sup>b</sup> or where the crime was committed;<sup>c</sup> but yet, at least in the opinion

<sup>u</sup> U. Huber in the appendix to his *Prael.* in lib. 1. tit. 3. J. Voet *Comm.* ad *Pand.* lib. 1. tit. 4. Pars II. I. N. Hert de collisione legum (in. op. Vol. 1. T. 1.). Against this practice are A. F. C. Hauss de principiis a quibus pendet legum sibi contrariarum auctoritas etc. Goett. 1824. Schweppe *Röm. Priv. R.* 1. B. § 20. a. b. Kori *Erörterungen* B. 3. Nr. 1. G. v. Struve über das Rechtsgesetz in Beziehung auf räumliche Verhältnisse. Carlsruhe 1834. Rosshirt *Zeitschrift* B. 3. 330—346. W. Schäffner *Entwicklung des internationalen Privatrechts.* Frkf. 1841. Hänsel *Handbuch der Institut.* B. 1. 402—428. Wächter im *Archiv f. civ. Prax.* B. 24. Nr. 2. B. 25. Nr. 1. 4. 12. K. Th. Pütter das praktisch. europ. *Fremdenrecht.* Leipz. 1845. Günther in *Weiske Rechtslexikon* B. 4. 721—755.

<sup>x</sup> Wächter *ubi supra* B. 25. 9 &c.

<sup>y</sup> Opinions vary as to this. Compare Hert l. c. Sect. 4. § 12. 14. 16. Riccius v. *Städtges.* 18. Hptst. § 6. Emminghaus ad *Cocceii* Lib. 2. Tit. 1. qu. 23. not. L.

<sup>z</sup> Hert l. c. § 65. 66. Riccius 15. Hptst. § 16. 17. See however Weber *nat. Verb.* § 95.

<sup>a</sup> For the altered meaning of this expression see Wächter *ubi supra* B. 24. 256.

<sup>b</sup> Kritz *Sammlung v. Rechtsfällen* B. 2. Nr. 7.

<sup>c</sup> L. 6. de evict. (21. 2.) cap. 6. X. de crim. falsi (5. 20.) cap. 8. de confirm. util. (2. 30.). Hert l. c. § 10. 21. 53. 54. 57. 58. 59. Riccius 2. B. 15. 18. Hptst. Kleinschrod *Grundw. des peñl. R.* § 122 &c. Also valid private acts are to be sustained abroad. Grolman über olographe und mystische Testamente. Giess. 1814. 14—103. *Contra* in (Almendingen) über die Grundlage &c. des olographen und mystischen Testaments. Wiesbaden 1814. 7—62. For several



of many writers,<sup>d</sup> a transaction which has taken place abroad is to be judged *in foro domicilii* not according to the *statuta mixta* but according to the *statuta personalia* of the subject. At any rate a transaction valid according to the *statuta mixta* is, *in foro domicilii*, to be held invalid if it was conducted abroad for the purpose of evading the laws of the subject's own country,<sup>e</sup> or if it be such as, though permitted abroad, is plainly opposed to the constitution of his country.<sup>f</sup>

3. If the laws of the place where immoveable property, or what is considered as such,<sup>g</sup> is situate, contain provisions applicable to things, such laws (commonly called *statuta realia*) must be observed in preference to the laws of either of the two preceding classes.<sup>h</sup> Moveable property is governed by the *statuta personalia*<sup>i</sup> unless the laws of the place where such property is, are expressly applicable to it.<sup>k</sup>

points connected with the *statuta mixta* see Hasse im Rhein. Mus. 2. Jhrg. 371—382. Mittermaier im Arch. für civ. Prax. 13. B. 2. Hft. Nr. 16. & in Elvers Themis B. 2. Nr. 3. Pfeiffer pract. Ausf. 3. B. 83—88. Funko Beiträge. Chemnitz 1830. Nr. 3. Wächter *ubi supra* B. 25. p. 37—242.

<sup>d</sup> Hert Sect. 4. § 10. See *contra* Weber natürl. Verb. § 62. Not. 2.

<sup>e</sup> Schäffner *ubi supra* § 85. Wächter *ubi supra* B. 25. p. 412—417.

<sup>f</sup> Weber nat. Verb. § 62.

<sup>g</sup> Leyser Sp. 26. m. 3. Pufendorf T. 3. Obs. 174. § 7 *et seq.*

<sup>h</sup> Hert l. c. § 9. 13. 17. 22. 30. 38. 41. 44. 46. 47. 64. Riccius 16. Hptst. Some weighty reasons against this theory, which obtains in practice in cases of succession *ab intestato*, are given in G. L. Menken D. de statutis civitat. provincialium in success. ab intestato ad bona etiam alibi sita secundum ius civile extendendis. Lips. 1741. § 9 (in his Opusc. Nr. 7.). Martin Rechtsgutachten. 1. B. 175. See too A. F. Meissner vom stillschw. Pfandrecht. Leipz. 1803. § 23. 24. 25.

<sup>i</sup> Hofacker princ. iur. R. G. T. 1. § 140.

<sup>k</sup> *contra* Wächter *ubi supra* B. 24. 297.

## CHAPTER VIII.

### OF THE DURATION AND REPEAL OF LAWS.

#### § 39.

A LAW does not of itself lose its binding power, unless the time for which it was to be binding has expired, or the conditions upon and for which it was made have ceased to exist.<sup>1</sup> Laws can only cease to be binding in consequence of some act of the legislative power.<sup>m</sup> By such an act every law may be repealed even though it contain a clause to the effect that it shall last for ever,<sup>n</sup> and though such clause be not expressly mentioned in and repealed by the later law.<sup>o</sup>

#### § 40.

**Modes of Repeal.**—A law may be altered in many ways and may be repealed in whole or in part. A law may be totally repealed (*abrogari*) either expressly or impliedly by some later law wholly inconsistent with it. A law may be partially repealed simply (*derogari*), or by some addition to it (*subrogari*) or by some alteration in it (*obrogari*) made by another inconsistent law.<sup>p</sup>

#### § 41.

**Effect of new on older Laws.**—An old law is repealed by a later

<sup>1</sup> Arg. L. 1. § 43. de aqu. quotid. (43. 20.) L. 6. § 14. de excusat. (27. 1.). The mere non-existence of the reasons for which the law was framed does not fall within this rule, *post* § 52.

<sup>m</sup> Arg. L. 27. C. de test. (6. 23.) and see *ante* § 17.

<sup>n</sup> E.g. L. 4. C. de SS. eccles. (1. 2.) L. 6. C. de sec. nupt. (5. 9.).

<sup>o</sup> I. N. Hert de lege clausula ne abrogar. possit munita § 8. (op. V. 1. T. 3. n. 1.). Others are of a different opinion on account of L. 14. pr. de legat. 1. (30.) L. 22. de legat. III. (32.) amongst them Bartolus in L. omnes populi D. de iust. et iur. col. 11. vers. quid dicemus.

<sup>p</sup> Ulpiani Fragm. T. 1. § 3. Dirksen Beiträge 294—297. Schilling Institut. B. 2. § 16.

one.<sup>1</sup> This however is only true when there is a complete and clear inconsistency between the old and the new laws; for a new law of doubtful meaning is always to be construed so that the least possible departure may be made from the law previously existing.<sup>2</sup> A new law is moreover, although general in its terms, to be held to repeal only that which was the *rule*, and not to apply to the exceptions to that rule,<sup>3</sup> unless such exceptions are referred to in the new law either expressly or impliedly, as where some only of the exceptions to the old are excepted from the operation of the new law.<sup>4</sup> The consequences of a law are of course destroyed by its repeal.<sup>5</sup>

#### § 42.

**Repeal of Privilegia.**—The preceding principles are on the whole applicable to *privilegia*.<sup>6</sup> (§ 31.) Advantageous *privilegia*<sup>7</sup> however, in case of opposition and consequent non-exercise, are lost as a general rule in thirty years<sup>8</sup> by prescription, and if opposed to the acquired rights of others, or consequently to older *privilegia*, are in cases of doubt to be treated as void.<sup>9</sup> The sovereign may at his pleasure recall a *privilegium* which he had granted *precario* or *ad beneplacitum*,<sup>10</sup> or which has been abused by the

<sup>1</sup> L. 4. de const. princ. (1. 4.).

<sup>2</sup> L. 35. pr. C. de inoff. testam. (3. 28.).

<sup>3</sup> L. 26. 27. 28. de I.L. (1. 3.) L. 80. de R. I. (50. 17.) L. 41. de poen. (48. 19.) L. 3. C. de silentar. et decur. (12. 16.) cap. 1. de constit. in 6. (1. 2.). F. T. Seydlitz (praes. Stockmann) de vi legum prior. in posterior. Lips. 1803. A partly different view is taken by Gönner jur. Abh. 1. B. Nr. 7. But compare L. 26. § 1. C. de usur. (4. 32.) with L. 2. 3. C. de usur. rei iudic. (7. 54.) L. 4. C. de aedifio. privat. (8. 10.) Nov. 158. praef. Thibaut Civil. Abh. 108—130. Bornemann im neuen Archiv. Rostock 1818. 178 is of quite a different opinion.

<sup>4</sup> E. g. L. 23. pr. C. ad SCt. Velleian. (4. 29.) Nov. 134. c. 8.

<sup>5</sup> Thibaut Vers. 1. B. 213—224.

<sup>6</sup> See especially I. G. F. Wasmuth de privilegior. natura. Goett. 1787. cap. 2. Quistorf kl. jur. Schrift. 1. Samml. 99. *et seq.*

<sup>7</sup> Rights to hold fairs are excepted by L. 1. de nundinis (50. 11.).

<sup>8</sup> Glück Pand. 2. B. § 110. Hufeland Geist des R. R. 1. B. 262—264, 274—281. Fritz in Linde Zeitschrift 4. B. Nr. 6. Steppes ebenda 14. B. Nr. 5.

<sup>9</sup> L. 7. C. de precib. imp. offer. (1. 19.) L. 4. C. de emancip. (8. 49.) cap. 1. de constit. in 6 (1. 2.).

<sup>10</sup> Wasmuth l. c. § 23. 24.

person to whom it was granted;<sup>c</sup> but a gross abuse and previous admonition are considered to be necessary to warrant a recall.<sup>d</sup> In other cases a *privilegium* can not be recalled unless such a measure is for the public benefit, and then only on indemnifying the grantee.<sup>e</sup> A *privilegium* is not, in a case of doubt, to be considered as having ceased on the death of the grantor;<sup>f</sup> but the grantee is at liberty to renounce it so far as he is interested in it,<sup>g</sup> provided such renunciation be not forbidden as it is by the popish rule which prohibits a person who enters any order from renouncing any of the privileges conferred upon it.<sup>h</sup> This rule, however, is not followed (except as regards ecclesiastics. *Froben*, § 42).

<sup>c</sup> can. 7. D. 74. cap. 11. 24. X. de privileg. (5. 33.).

<sup>d</sup> arg. c. 43. X. de rescript. (1. 3.) arg. II. Feud. 27. § 7. Stryk de iure privilegiat. contra privil. § 33. Idem de abusu iur. quaesiti. cap. 4.

<sup>e</sup> Struben 2. B. 80. Bed. Müller ad Leyser Obs. 43. Hommel Rhaps. Obs. 469. Upon imperial *privilegia* see Gerstlacher corp. iur. germ. 4. B. 9. Cap.

<sup>f</sup> Wasmuth l. c. § 29. *et seq.*

<sup>g</sup> L. 29. C. de pact. (2. 3.) cap. 6. X. de privil. (5. 33.). Wasmuth l. c. § 24.

<sup>h</sup> Cap. 12. X. de foro comp. (2. 2.). The rule is even denied by Hufeland Geist des Röm. R. 1. Thl. 286—290.

## CHAPTER IX.

## OF INTERPRETATION.

## § 43.

THE purpose of every law is its own application to cases specified in it. In order to be able properly to apply a law, it is not sufficient merely to know its meaning and to be acquainted with the events which give rise to rights and duties, but it is necessary to possess in addition a considerable amount of general knowledge and of tact, which it is the object of sound education to impart. Passing over that which belongs to the latter, there remain to be examined here the principles which govern the interpretation of laws and of legal instruments.

## I.—INTERPRETATION OF LAWS.

## § 44.

By the interpretation of a law is meant an accurate statement of the precept contained in it (the meaning of the law). A system of rules by the observance of which such a statement may be made is Juridical Hermeneutics.<sup>1</sup>

<sup>1</sup> V. Forster *de iuris interpr.* (Otto Thes. T. H.). F. Rapolla *de iureconsulto, s. de rat. descend. interpr. iur. civ.* Neap. 1726. 8. translated into German with notes by Griesinger. Stuttg. 1792. 8. C. H. Eckhard *hermen. iur. cum not.* C. F. Walch. Lips. 1779. 8. edited also by C. W. Walch. Lips. 1802. 8. I. G. Sammet *Hermeneutik des Rechts*, edited by F. G. Born. Leipz. 1801. 8. F. Maglianus *de iuris interpretandi ratione.* Neapoli 1808. M. A. Mailher de Chassat *tr. de l'interprétation des lois.* Paris 1822. 8. W. F. Clossius *Hermeneutik des Rechts.* Leipz. 1831. 8. See as to the subject of interpretation in general: *Zusätze und Bericht. zu den Inst. des R. R.* 171—190. G. S. Teucher *de natura et formis interpr. observ.* Spec. 1. & 2. Lips. 1804. K. S. Zachariä *Vers. einer allgemeinen Hermeneutik des Rechts.* Meissen 1805. Zirkler *Revision der Lehren des positiven Rechts.* Wetzlar 1807. 2. B. S. 34 *et*

A law may be interpreted either by the law-giving power (*interpretatio legalis*) or otherwise (*int. doctrinalis*). Legal interpretation is again either authentic (*int. authentica*)<sup>k</sup> or customary (*usualis*),<sup>l</sup> according as it proceeds from the sources of written or unwritten law respectively. The authority of legal interpretation depends, not on its agreement with the rules of hermeneutics, but simply on the extent of the law-giving power of the person declaring it.<sup>m</sup> The rules which follow are only required for doctrinal interpretation.

### § 45.

It is necessary clearly to distinguish from each other :

1. That which is actually signified by the words as they stand (meaning of the words) :
2. That which was meant to be expressed (the intention <sup>n</sup> of the legislator) : and
3. The result arrived at by a logical deduction from the reason of the law.<sup>o</sup>

An interpretation if based upon the meaning of the words of a law is termed *grammatical*. If based, as it ought to be,<sup>p</sup> upon the spirit of the law (*sententia legis*), i.e. upon the intention of the legislator and the reason of the law, the interpretation is termed *logical*.<sup>q</sup>

*seq.* Hufeland Geist des Röm. R. 1. Thl. 1—211. Savigny System B. 1. § 32—50. Thibaut Hermeneutik u. Kritik edited by Guyet. Berlin 1842. Hänsel Institutionen B. 1. 428—468. Günther in Weiske Rechtslexikon B. 4. 701—711.

<sup>k</sup> L. 12. § 1. C. de legg. (1. 14.).

<sup>l</sup> L. 37. 38. eod. (1. 3.).

<sup>m</sup> Savigny System B. 1. § 32.

<sup>n</sup> Savigny *ubi supra* § 33. Note a.

<sup>o</sup> *contra* Vangerow Leitfaden § 24.

<sup>p</sup> L. 12. 13. 29. 30. de LL. (1. 3.) L. 13. § 2. de excusat. (27. 1.) L. 6. § 1. de V. S. (50. 16.). See *contra* Schöman Handbuch 1. B. p. 137.

<sup>q</sup> Thibaut Versuche 2. B. 9. Abh. and Theorie der log. Ausl. 2te Aufl. Altona 1806. § 3. Of a somewhat different opinion is Teucher l. c. Spec. 1. p. 16—24., and a very peculiar view is taken by Guyet Abhandl. Nr. 7. Against the division of interpretation into grammatical and logical see Kritiz Sammlung v. Rechtsfällen B. 3. Nr. 8. Savigny System B. 1. § 50.

## § 46.

The person on whom the duty of interpretation falls must in the first place look to the words used, and must only resort to a logical interpretation when there is a clear necessity for so doing.<sup>r</sup> If he can not ascertain either the meaning of the words or the spirit of the law, he must search for an authentic interpretation.<sup>s</sup> If, however, a doctrinal interpretation is possible he must abide by it, even though the result at which he may so arrive be opposed to that which notions of natural justice and morality, or of what is ambiguously called equity<sup>t</sup> (*equitas*), may seem to require.<sup>n</sup>

## 1. Grammatical.

## § 47.

It is the object of grammatical interpretation to ascertain the meaning of words from the use that is made of them in language,<sup>a</sup> and to discover whether a word has one or more meanings. In the latter case we have the following classes.

A. With reference to its origin, one meaning may have been introduced by common usage, and another by the usage of a limited class of persons. In the former of these two cases the meaning of the word is said to be common (*significatio vulgaris*), in the latter, peculiar (*significatio particularis*), and the word itself is called technical (*terminus technicus*).

B. With reference to its actual currency, one meaning may be

<sup>r</sup> L. 12. de LL. (1. 3.). Thibaut Theorie d. log. Ausl. § 9.

<sup>s</sup> L. 1. 9. 11. C. de LL. (1. 14.). Woltaer Obs. Fasc. 1. n. 1. Thibaut Theorie § 19.

<sup>t</sup> L. 1. de minor. (4. 4.) L. 19. pr. de captivis (49. 15.) L. 90. de R. I. (50. 17.). See as to the different notions of equity: I. L. Conradi de iuris et acqutatis inter se consensu. (opusc. vol. 1.). Kleins Annalen 1. B. 357—390. L. H. Jordan über die Billigkeit bei Entscheidung der Rechtsfälle. Götting. 1804. 23—54. F. A. Schilling de acqutatis notione. Lips. 1835.

<sup>a</sup> L. 12. § 1. qui et a quib. manum. (40. 9.) L. 19. de appell. (49. 1.) L. 1. C. de LL. (1. 14.) Auth. Jubemus C. de iudic. (3. 1.). Vinnii quaest. sel. L. 1. c. 2. Hartleben med. Sp. 4. m. 9. Müller ad Leyser Obs. 5. 6. For different views see Jordan *ubi supra* 54. Kritz *ubi supra* Nr. 8. § 10.

<sup>n</sup> I. H. Boehmer de interpr. grammat. fat. et usu in iure Rom. (in Exerc. T. I. also as a preface to Brissonius de V. S.).

usual or proper (*significatio propria*), and the other may be unusual or improper (*significatio impropria*), or both meanings may be equally usual (*ambiguitas, verbum æquivocum*).

C. Lastly, considered with reference to its extent, one meaning may embrace much more than the other. The former is then called wide or extended (*significatio generalis vel lata*), and the latter narrow or restricted (*significatio specialis vel stricta*).

#### § 48.

An interpretation strictly grammatical and arrived at by confining oneself to the exact meaning of the words of an unambiguous law is called literal (*interpretatio verbalis*). An interpretation of an ambiguous law is said to be liberal (*interpretatio lata*) if based upon the wider meaning of the words used, and strict (*interpretatio stricta*) if upon the narrower. By a strict interpretation is, however, often meant a literal interpretation of a law, whether ambiguous or unambiguous, as opposed to any logical extension of its literal meaning.<sup>7</sup>

#### § 49.

Where a word has several meanings and it is doubtful which is the true one, the most common and usual must be taken,<sup>a</sup> unless it can be shown that a peculiar mode of expression has been adopted by the law-giving power.<sup>a</sup> If the meaning of a word has changed in different times, that meaning is to be preferred which was common when the law, in which the word is found, was promulgated.<sup>b</sup> Laws which are really ambiguous can only be interpreted grammatically by a correct statement of every meaning they may possibly have; which of these is to be deemed the true meaning must be discovered by logical interpretation.<sup>c</sup> *Privilegia* are subject to the above rules; and in doubtful cases they are to

<sup>7</sup> Teucher l. c. p. 25—34.

<sup>a</sup> L. 69. pr. de leg. III. (32.) L. 1. pr. compared with L. 7. § 3. ad. SCt. Maced. (14. G.). Rapolla l. c. p. 132—137.

<sup>a</sup> L. 1. L. 52. de V. S. (50. 16.) comp. with L. 3. § 1. de negot. gest. (3. 5.).

<sup>b</sup> Boehmer l. c. § 9. not. q.

<sup>c</sup> Forster l. c. L. II. c. 2. pr. nr. 3. 4.



be interpreted grammatically unless the sovereign has interpreted them authentically.<sup>d</sup> The law-giver must moreover always, until the contrary is shown to be the case, be presumed to have expressed himself correctly, and therefore in cases of doubt is to be considered as having enacted everything logically implied by the words he has used (*argumentum a contrario*).<sup>e</sup>

## 2. Logical.

### § 50.

The results arrived at by a logical interpretation<sup>f</sup> of a law may or may not be the same as those arrived at by its grammatical interpretation. If the former be the case logical interpretation may agree with the clear words or may determine, if the words have more meanings than one, which of these meanings is to be adopted (*interpretatio declarativa*). If the logical be not in harmony with the grammatical interpretation, the result given by the former may differ wholly or only partly from that given by the latter; if only partly the application of the law will have to be either extended to more, or restricted to fewer cases than grammatically speaking are provided for by it. In the former case the interpretation is called extensive (*interpretatio extensiva*), in the latter restrictive (*interpretatio restrictiva*).<sup>g</sup> It thus appears that the division of logical interpretation into declaratory extensive and restrictive is not exhaustive; but an examination of each of these three classes will be sufficient for all purposes, inasmuch as the principles developed by such an examination will be found applicable to every possible case.

<sup>d</sup> This is not opposed to L. 43. pr. de vulg. et pup. subst. (28. 6.). Wasmuth de natur. privil. c. 1. § 13. I. S. Pütter de iure et offic. iudic. circa interpr. priv. Idem de iure et offic. summ. imp. tribun. circa interpr. priv. (op. n. 5. 6.) and his Rechtsf. 1. B. P. 2. Resp. 25.

<sup>e</sup> Thibaut Versuche 1. B. 280—284.

<sup>f</sup> Donelli comment. L. 1. c. 13. 14. Franzke comm. ad P. L. 1. T. 3. Thibaut Theorie der log. Ausl. Altona 1799. 8. 2nd edition 1806. 8.

<sup>g</sup> According to Savigny System B. 1. § 50. this division is based on the mistake that the word interpretation corresponds exactly with the Roman *interpretatio*, i.e. gradual formation of the law. L. 2. § 5. de orig. iur. (1. 2.).

**A. EXTENSIVE.**

## § 51.

Considering the reason of a law, one of the fundamental rules applicable to extensive construction is that whenever the *very same reason* for which the law was made to extend to certain specified cases is also applicable to another unspecified case, the latter must be governed by the same law as the former,<sup>b</sup> whether that law be written or unwritten.<sup>i</sup> Penal and modifying laws are to be thus interpreted extensively; provided by so interpreting the latter those positive laws left unaltered are not deprived of their effect.<sup>k</sup> *Privilegia, jura singularia*<sup>l</sup> and laws, the extensive interpretation of which is forbidden,<sup>m</sup> are not to be thus interpreted.

Considering the object the law-giver had in view, every law should be extensively interpreted so as to carry that object fairly out.<sup>n</sup> Extensive interpretation of a law founded on its reason is commonly called interpretation by analogy.<sup>o</sup>

**B. RESTRICTIVE.**

## § 52.

The *maxim cessante ratione legis cessat lex ipsa* is altogether

<sup>b</sup> L. 12. 13. de I.L. (1. 3.). Thibaut Theorie § 17. See *contra* as to the necessary sameness of the reason Franzke l. c. n. 40—68. Hofacker princ. iur. R. G. § 156. Of a totally different opinion is H. Cock de argumento ad analogiam etc. Daventriae 1821. p. 28 sqq.

<sup>i</sup> Glück Pand. B. 1. § 87. This is not opposed to L. 39. de LL. (1. 3.). Beitr. u. Bericht. zu den Inst. des R. R. 165—167.

<sup>k</sup> L. 2. § 29. ad SCt. Tert. (38. 17.) L. 3. de L. Pomp. de parieid. (48. 9.) L. 7. § 3. ad L. Iul. Maiest. (48. 4.). See as to different notions Thibaut Theorie § 21. Franzke l. c. n. 40—70. Feuerbach Revision 2. B. 17 &c. Chassat de l'interprétation p. 163—173. See Jordan über d. Auslegung der Strafgesetze. Landshut 1818.

<sup>l</sup> L. 14. de I.L. (1. 3.) L. 141. pr. L. 162. de R. I. (50. 17.) L. 23. § 3. de fid. her. (40. 5.). Thibaut Theorie § 19. The contrary is supposed by I. C. Conradi ad Jul. Paul. ex libro singulari de iure singulari reliqua Fragm. I. § 9—12.

<sup>m</sup> Thibaut Theorie § 18. Thibaut Vers. 1. B. 272—276.

<sup>n</sup> Thibaut Theorie § 12.

<sup>o</sup> Thibaut Theorie § 28. Savigny System B. 1. § 46. Hansel Institut. B. 1. 368—371. Wächter in Archiv des Criminal-rechts 1844 B. 1. Nr. 12.

false when applied to restrictive interpretation. If after a time the reason of a law ceases to exist, the law itself nevertheless continues binding,<sup>p</sup> and it is not to be interpreted restrictively merely because some particular case may not come within its reason.<sup>q</sup> Restrictive interpretation is only to be adopted when it can be shown that the law-giver did not intend the law to extend to the case in question.<sup>r</sup>

### C. DECLARATORY.

#### § 53.

As for declaratory interpretation (§ 50), one must endeavour to ascertain the reason of a law and the special object of the law-giver, and to carry out the conclusion thus arrived at in preference to all others. If it be, nevertheless, uncertain what interpretation should be adopted, the general intent of the law-giver is, we are told that

a. That meaning of the words which is most conformable to the nature of the case is to be preferred.<sup>s</sup>

b. In modifying laws and *privilegia* the narrowest meaning is to be taken, i.e. that meaning which causes the least departure from the existing law;<sup>t</sup> but still full effect is to be given to the words of unambiguous *privilegia*.<sup>u</sup>

c. If none of these principles can be applied a judge is always to adopt the most equitable and lenient meaning of which the words are capable.<sup>v</sup>

<sup>p</sup> Struben 2. B. 144. Bed. Thibaut Theorie § 22. Vangerow Leitfaden § 25.

<sup>q</sup> L. 4. 5. 6. 8. de LL. (1. 3.) L. 1. pr. § 3. de minor. (4. 4). Avenan interpr. L. 5. c. 10. Voorda int. L. 1. c. 1. Weber über die nat. Verb. § 64.

<sup>r</sup> L. 6. § 2. de iure patron. (37. 14.) L. 19. ad exhib. (10. 4.) L. 13. § 1. de excus. tut. (27. 1.).

<sup>s</sup> L. 67. de R. I. (50. 17.).

<sup>t</sup> L. 35. pr. C. de inoffic. test. (3. 28.). L. 43. de vulg. et pup. (28. 6.). Thibaut Theorie § 15. I. H. Boehmer de finib. privil. regund. c. 2. § 9. (Exerc. T. I.). Pütter in den § 49. Not. y. cit. Abh. With respect to interpretation injurious to the sovereign see *contra* Stryk de interpret. priv. c. 4. Leyser Sp. 10. m. 3. Wasmuth de natur. privil. c. 1. § 13 is doubtful.

<sup>u</sup> L. 3. de const. princ. (1. 4.) and see Thibaut Theorie § 15. p. 54. 2nd edition.

<sup>v</sup> L. 42. de poen. (48. 19.) L. 56. L. 155. § 2. de R. I. (50. 17.).

### 3. Of Criticism.

#### § 54.

It is of very considerable importance, in the actual state of the Roman law, to determine how far a jurist is at liberty, by his own criticism, to form a text having the force of law. There are two principles to be kept in mind here :

A. A judge ought not, without an authentic interpretation, to proceed farther, if the rules of interpretation are insufficient for his purpose ;<sup>7</sup>

B. The Roman law has not been adopted from the text of any one manuscript, but from that of several manuscripts. Hence it follows that we are at perfect liberty to choose the text of that manuscript which appears to us the best, and to correct errors in the printed copies by collation with it, but if the text of the manuscript is certain an alteration is only to be allowed in case all the conditions for a logical interpretation are present.<sup>8</sup>

## II.—INTERPRETATION OF OTHER INSTRUMENTS.\*

#### § 55.

The Roman law contains an almost innumerable number of rules for the interpretation of legal instruments.<sup>9</sup> The laws applicable to particular agreements, *servitudes* and legacies, for the most part depend on nothing else. The following main principles are all that can here be noticed.

<sup>7</sup> See above § 46.

<sup>8</sup> With this qualification I still adhere to the opinion formerly expressed by me in my Vers. 1. B. Nr. 16. For the views of others see I. L. Conradi *vitiorum criticorum climax, adversus Ranchinum*. Lips. 1762. Feuerbach *Civ. Vers. 1. B. 3. Abh.* But see *contra*: Thibaut *Theorie* § 44. Compare also Hufeland *Geist des Röm. R. 1. Thl.* 70—81. Spangenberg *Einleitung*. 243—253.

\* The translator has preferred to use the word instruments throughout this and the following section, although the principles stated in the text apply as well to verbal as to written agreements &c. The German word is *Geschäft*.

<sup>9</sup> *Mantica de tacit. et ambig. convent.* Avenar *interpr.* l. II. c. 2. 30. l. III. c. 16—30. l. IV. c. 1. 2. 3. 9—17. l. V. c. 1. 2. 5—12. C. F. Alef *de eo quod aequ. est in dubiis convent.* (in his *dies acad.* n. 8.). Unterholzner *Lehre v. d. Schuldverhältnissen* B. 1. § 41.

**Words.**—In the first place, according to what has already been said upon grammatical interpretation, attention must be paid to the meaning of the words used;<sup>b</sup> and these are to be taken in the sense usual in the place where the transaction occurred.<sup>c</sup> Unrestrained general words are to be taken in a corresponding sense, and no word is to be treated as superfluous,<sup>d</sup> even though the whole instrument should, when correctly interpreted, prove good for nothing.<sup>e</sup>

If, however, the sense of the words be obscure or ambiguous, then that meaning is to be adopted

a. By which some effect may be given to the instrument;<sup>f</sup> or,

b. By which the result most agreeable to the nature of its subject matter may be attained;<sup>g</sup> and lastly,

c. By which the losing party is least prejudiced;<sup>h</sup> but still in cases of doubt the words are to be taken most strongly against him by whom the first proposals touching the matter in question were made<sup>i</sup> (as in general the seller or lender). Marriage gifts are especially favoured.<sup>k</sup>

#### § 56.

**Intention.**—Words are merely a means to an end; and if an intention contrary to the meaning expressed by them can be proved,<sup>l</sup>

<sup>b</sup> L. 7. § 2. du supel. leg. (33. 10.). L. 69. de leg. III. (32.).

<sup>c</sup> L. 50. § 3. de leg. I. (30.) L. 65. § 7. de leg. III. (32.) L. 18. § 3. de instructo. (33. 7.) Wächter im Archiv f. civ. Prax. B. 19. Nr. 5.

<sup>d</sup> L. 31. de evict. (21. 2.) L. 23. de S. P. U. (8. 2.) L. 26. § 2. de pact. dotal. (23. 4.).

<sup>e</sup> L. 9. § 6. de R. C. (12. 1.).

<sup>f</sup> L. 22. pr. de usu (7. 8.) L. 41. L. 80. 134. § 1. de V. O. (45. 1.).

<sup>g</sup> L. 9. de servit. (8. 1.) L. 43. pr. de damn. inf. (39. 2.) L. 67. de R. J. (50. 17.).

<sup>h</sup> L. 34. de R. I. (50. 17.) L. 99. de V. O. (45. 1.).

<sup>i</sup> L. 17. § 3. 4. de S. P. U. (8. 2.) L. 21. 33. 34. pr. de contr. emt. (18. 1.) L. 39. de pact. (2. 14.) comp. with L. 40. 68. pr. de contr. emt. (18. 1.) L. 6. § 6. L. 11. § 17. L. 26. 27. de act. e. v. (19. 1.). For other views see I. H. Boehmer de interpr. fac. advers. eum qui clarius loqui debuisset (Exerc. T. II.). Cuiac. Obs. L. 1. c. 10. Avera interpret. L. 2. c. 2. Pufendorf T. 1. Obs. 132. § 8.

<sup>k</sup> L. 85. pr. de R. I. (50. 17.).

<sup>l</sup> An extensive interpretation *ob rationem* cannot be allowed in the case of private instruments. Schweppe Röm. Privatr. 1. B. § 124.

effect must be given to this intention rather than to the words used.<sup>m</sup> A distinction, however, is made between Bilateral and Unilateral instruments.

*a.* In bilateral instruments the words, if clear, must be followed even against the intention of one of the parties :<sup>n</sup> but, where the intention of both parties is the same, effect must be given to it against the clearest words.<sup>o</sup> The preamble of an instrument generally affords the best means of discovering the intention of the parties thereto.<sup>p</sup>

*b.* In unilateral instruments the intention of the speaker has to be ascertained and followed, and if the meaning of his words be doubtful, recourse must be had to his previous explanations and statements.<sup>q</sup> If the instrument, as for instance a testament,<sup>r</sup> be such that it cannot be upheld without a will expressed, a proved intention, inconsistent with the words themselves, operates merely to destroy their effect, but cannot go further and render operative a disposition not warranted by the words used.<sup>s</sup> If no satisfactory result can be arrived at in any one of these ways the instrument must be held void.<sup>t</sup>

<sup>m</sup> L. 69. pr. de leg. III. (32.) L. 6. de pignor. (20. 1.) L. 5. de transact. (2. 15.).

<sup>n</sup> L. 99. pr. de V. O. (45. 1.).

<sup>o</sup> L. 219. de V. S. (50. 16.).

<sup>p</sup> L. 134. § 1. de V. O. (45. 1.). Mantica l. c. cap. 4. Tit. 9. S. Stryk de iure praeftationum cap. 2. § 4. I. H. Boehmer consult. et. dec. T. 2. P. 1. Resp. 68. n. 24. R. 318. n. 8. R. 560. n. 11. R. 564. n. 6. R. 642. n. 5. T. 2. P. 2. R. 914. n. 11. T. 3. P. 1. R. 177. n. 15.

<sup>q</sup> L. 66. de iudic. (5. 1.) L. 52. pr. L. 83. § 1. de V. O. (45. 1.) L. 96. de R. I. (50. 17.).

<sup>r</sup> See further as to the interpretation of wills the last § of Thibaut's System.

<sup>s</sup> L. 9. pr. de hered. inst. (28. 5.) L. 7. § 2. de supellect. legat. (33. 10.).

<sup>t</sup> L. 10. pr. de reb. dub. (34. 5.) L. 73. § 3. de R. I. (50. 17.).

## PART II.

## OF THE CONSEQUENCES OF LAWS.

## CHAPTER I.

## OF RIGHTS AND DUTIES CONSIDERED BY THEMSELVES.

## DIVISION I. OF RIGHTS.

## § 57.

RIGHTS and duties are the results of laws. In considering rights and duties we must carefully distinguish: (1) rights and duties themselves, or power and necessity; (2) their *subject* or the person for whom something is possible or necessary; (3) their *object* or that which is possible or necessary, and (4) their *foundation* or that which calls them into existence and sustains them afterwards.

## I.—FREEDOM OF ACTION.

## § 58.

As a right is neither more nor less than a legal power to compel, everything done in exercise of a right is juridically speaking lawful, even if another be hurt thereby.<sup>u</sup> If however an act in itself lawful be performed craftily to evade a law<sup>x</sup> or merely with the cunning intent to hurt another,<sup>y</sup> such act must be treated as if it were forbidden by law.

<sup>u</sup> L. 151. L. 155. § 1. de R. I. (50. 17.).

<sup>x</sup> L. 3. § 3. ad Sct. Macedon. (14. 6.).

<sup>y</sup> The old doctrine was well founded on the moral tendency of the Roman law (§ 9) and on L. 1. § 12. L. 2. § 9. de aqua et aquae pluvi. (39. 3.), Nov. 63., but not so well on L. 38. de R. V. (6. 1.) L. 3. pr. de oper. publ. (50. 10.). Carpzov Decis. n. 104. Gail L. 2. Obs. 69. Pufendorf T. 4. Obs. 263. S. Stryk de iure aemulationis. c. 1. n. 13. Hert de servitute naturaliter

## II.—POWER OF COMPULSION.

### § 59.

Every right is as such accompanied by a power of compelling the performance of or forbearance from some positive act. In the absence of such a power no right properly speaking is conceivable; but a right may well exist without there being any absolute necessity to exercise that power.<sup>2</sup>

This power of compulsion can as a rule only be exercised with the aid of a judge. With such aid the power may be exercised either actively (by an action), by seeking the assistance of the judge to compel another to perform his duty,<sup>a</sup> or passively (by way of defence), by bringing forward one's own right in answer to an action instituted by another. Generally speaking the latter course is most advantageous in consequence of the more favourable position of a defendant as compared with that of a plaintiff.<sup>b</sup>

## III.—MODES OF COMPULSION.

### 1. Extrajudicial.

#### § 60.

**Offensive.**—A person seeking himself to enforce a right can do so by acting offensively or defensively. The former course, whenever judicial assistance can be procured,<sup>c</sup> is as a general rule forbidden,<sup>e</sup> unless expressly allowed<sup>d</sup> by the supreme power or by

constituta. Sect. 2. § 11. See *contra* C. Thomasius non-ens actionis forensis contra aedificantem ex accumulatione (Diss. T. 2. n. 61.). Hufeland Geist des Röm. R. 1. Thl. 92. Gesterding Nachforsch. 3. B. 191—197. Schweppe Röm. Priv. R. 1. Bd. § 146. Sintenis Civilrecht B. 1. § 27.

<sup>2</sup> This is inserted because Müller ad Leyser Obs. 44., attributes no power of compulsion to negative *privilegia*.

<sup>a</sup> G. Hasse im Rhein. Museum B. 6. Nr. 1. & 6. Savigny System Bd. 5. § 205.

<sup>b</sup> Weber's Beitr. to his Kl. u. Einr. 1. N. 1.

<sup>c</sup> L. 10. § 16. quae in fraud. cred. (42. 8.).

<sup>d</sup> L. 3. C. de pignor. (8. 14.). Pufendorf T. 2. Obs. 62. Struben 2. B. 32. Bed. 3. B. 57. Bed.

<sup>e</sup> Claproth ord. Proc. § 2. 3. 4. 5. For the history of these doctrines see in C. F. Waleh disquis. hist. iur. civ. de vindict. privat. Ien. 1768. (op. T. 1.). Linde Zeitschrift 1. B. Nr. 21. Fritz Erläuterungen 1. Hft. 125—131. S. Benfey im. Rhein. Mus. B. 7. Nr. 1. Vangerow Leitfaden § 133.



agreement between the parties ; but by no private agreement can a person be lawfully empowered to use personal violence. By the Roman law (generally attributed to a *Decretum D. Marci*) he who acts aggressively in enforcing a right incurs, as a penalty, if the person aggrieved insists upon it, the forfeiture of that right to him ; or, if the right had really no existence, the aggressor can be compelled to restore whatever he took away, together with its full value.<sup>f</sup> These punishments attach to a person possessing in right of another if he, without cause, delays the giving up of the thing until judgment.<sup>g</sup> They are moreover not obsolete.<sup>h</sup>

### § 61.

**Defensive.**—Every one on the other hand is permitted to enforce a right defensively,<sup>i</sup> and so to protect not only his person<sup>k</sup> but also every thing else of which he is in actual possession ;<sup>l</sup> but even in this case no one is allowed to employ more force than is necessary to repel the unlawful aggression (*moderamen inculpate tutelæ*).<sup>m</sup>

## 2. Judicial.

### A. ACTIONS.

### § 62.

**Actions in rem, in personam.**—With the above exceptions the rule mentioned in § 59 is of universal application. Before proceeding

<sup>f</sup> L. 7. L. 10. C. unde vi (8. 4.) L. 13. quod met. c. (4. 2.) L. 7. ad L. Iul. de vi (48. 7.) Nov. 60. c. 1. I. H. Boehmer de poena ius sibi dicent. sine iudice. Hal. 1725. c. 1. (in Exere. T. II.). Müller ad Leyser Obs. 839.

<sup>g</sup> L. 34. C. locat. (4. 65.) L. 10. C. unde vi (8. 4.). Grolman & Löhr Magaz. 4. Bd. 375. 376.

<sup>h</sup> K. G. O. v. 1521. Tit. 32. § 2. R. A. v. 1532. Tit. 3. § 15. Boehmer l. c. cap. 2. Kind quaest. for. T. 3. c. 2. See *contra* Claproth *ubi sup.* § 3.

<sup>i</sup> Hellfeld de violenta rer. nostrar. defensione (op. n. 21.). Schilling Institut. B. 2. § 100.

<sup>k</sup> L. 4. C. de L. Corn. de sicar. (9. 16.) L. 4. L. 5. pr. L. 45. § 4. L. 52. § 1. ad L. Aquil. (9. 2.). See generally Exners Tod by K. W. S. Grattenauer. Breslau 1806. 48—194. E. v. Löhr die Theorie der Culpa. Giess. 1806. § 16.

<sup>l</sup> See below § 226. 230.

<sup>m</sup> L. 1. C. unde vi (8. 4.). S. L. E. Püttmann de moderamine inculpatae tutelæ. Lips. 1783.

further it is necessary to advert to the most important sorts of actions,<sup>n</sup> and more especially to the celebrated division of them into those *in rem* (*vindicationes*) and those *in personam*.<sup>o</sup>

To the first class belong all those actions which by their nature can as a general rule<sup>p</sup> be instituted *by* a person merely by virtue of some right vested in him, (that is to say without reference to any circumstances giving rise to a special duty on the part of the defendant) *against* any one who disputes or obstructs such right, and *for* the purpose of compelling him to respect it.

Actions *in personam*, on the other hand, are those which presuppose circumstances giving rise to some special duty in the defendant.<sup>q</sup>

There are no actions which are at the same time and in the above sense both *in rem* and *in personam*; but mention is sometimes made of such, and to them the name of *actiones mixtæ* is given. The term mixed may, however, without impropriety be applied to those actions in which either party might be plaintiff and either defendant.<sup>r</sup>

Actions *in personam* are termed generally *condictiones*; <sup>s</sup> but this word is strictly applicable only to those actions *in personam* which arise from unilateral transactions, and are brought for the recovery of property.<sup>t</sup> It was the practice amongst the Romans

<sup>n</sup> The great practical work on this subject is J. L. Schmidt Lehrb. v. den Klag. und Einred. with additions by A. D. Weber. 6. edition. Jena 1803. 8 edn. by C. Martin. Jena 1823; and for theory see Savigny System B. 5. Berlin 1841, and Weiske Rechtslexikon B. 1. 37—98.

<sup>o</sup> See Froben on this §.

<sup>p</sup> Savigny *ubi sup.* B. 5. § 208. Note k. *et seq.*

<sup>q</sup> § 1. 13. 15. I. de act. (4. 6.). L. 25. pr. de O. et A. (44. 7.) Thibaut Versuche 2. B. Nr. 2. Feuerbach civilist. Vers. 1. B. 8. Abh. is on many points of a different opinion. Du Roi im Archiv für civilist. Praxis. 6. B. Nr. 14.

<sup>r</sup> L. 10. fin. regund. (10. 1.) L. 37. § 1. de O. et A. (44. 7.). See *contra* § 20. I. de act. (4. 6.) and Theophilus *ibid.* See especially Heise und Cropp jurist. Abh. 1. Bd. Nr. 9. § 3—9.

<sup>s</sup> L. 25. pr. de O. et A. (44. 7.). Schilling Institut. B. 2. § 104.

<sup>t</sup> § 15. I. de act. (4. 6.) Dig. L. 12. Tit. 1. 4. 5. 6. 7. Compare J. a Costa ad § 15. l. cit. Hugo Civ. Mag. 1. B. 197. 198. E. Gans Röm. Obligationenrecht. Heidelb. 1819. 2. Ortolan Inst. 462.

to mention the defendant by name in the formula applicable to actions *in personam*, and not in that applicable to those *in rem*, but there were some actions of the former class in which this practice was not observed, and such were termed *in rem scriptæ*.<sup>a</sup> Actions *in rem* are generally instituted by a person out of possession against him in possession.<sup>x</sup>

### § 63.

**Interdicts.**—To the class of actions *in personam* <sup>y</sup> belong what are called *Interdicts*.<sup>z</sup> The term *actio* denotes that kind of action in which the slow ordinary procedure is followed; the term *interdictum* denotes on the other hand that kind of action in which the quick summary procedure is taken.<sup>a</sup> According to the old Roman procedure the Prætor used, even in interdicts, to refer the parties to a *Judex*, in order that the facts in dispute might be enquired into by him.<sup>b</sup> The division of interdicts into *restitutoria*, *exhibi-*

<sup>a</sup> L. 9. § 8. quod met. caus. (4. 2.) L. 1. § 3. de interdict. (43. 1.). Heineccii antiquit. L. 4. T. 6. § 24—30. On the last-mentioned actions see Savigny *ubi supra* § 208. Note b. Schmidt v. Ilmenau Civ. Abh. Jena 1841. Nr. 1.

<sup>x</sup> § 2. I. de act. (4. 6.). The case here mentioned by Justinian has given rise to much difference of opinion. Cocceii L. 8. T. 5. qu. 3. See thereupon in Doujat Diss. de uno casu § 2. I. de act. at the end of Reitz editio Theophili excurs. XVIII. and Fritz in Linde (new) Zeitschrift B. 1. Nr. 2.

<sup>y</sup> L. 1. § 3. de interd. (43. 1.).

<sup>z</sup> See upon them Inst. IV. 15. Gaius IV. 138—170. Dig. lib. 43. tit. 1. Cod. lib. 8. tit. 1. I. F. de Retes de interdictis et remediis possessoriiis (Meerman Th. T. 7.). Haubold in Savigny Zeitschrift B. 3. Nr. 12. Savigny das Recht des Besitzes 6. edn. Giess. 1837. 4ter Abschn. Schmidt v. Ilmenau Civ. Abh. Nr. 2. Heimbach in Weiske Rechtslexikon B. 5. 526—636. B. W. Leist die Bonorum-possessio. Götting. 1844. B. 1. § 51—56.

<sup>a</sup> The summary nature of interdicts is denied by Merenda controuv. l. 24. c. 39. § 4—11, 17; c. 45. § 52—60., and also by Savigny *loc. cit.* § 34. Zeitschrift B. 5. Nr. 1., Leist *loc. cit.* But see Cod. Theod. lib. 2. tit. 4. c. 5. 6. lib. 4. tit. 22. c. 4. 6. L. 4. C. de interdict. (8. 1.) L. 8. C. unde vi (8. 4.) L. 1. C. si per vim (8. 5.) L. 14. C. de agricol. (11. 47.). Bayer Theorie der summar. Proc. 2. edn. p. 162. 166. 167. Linde Civilpr. 4. edn. § 342. Mühlenbruch Pand. B. 1. § 155.

<sup>b</sup> Gaius IV. 141, L. 21. pr. quod vi aut clam. (43. 24.) L. 3. § 3. de lib. exhib. (43. 30.). J. a Costa ad. pr. I. de interdictis. C. G. Haubold notitia fragmenti Veronensis de interdictis Lips. 1816. Savigny Zeitschrift B. 3. Nr. 4. 8. 12. Savigny Besitz § 34.

*toria* and *prohibitoria*, appears not to be quite logical: <sup>c</sup> but it is otherwise with the division of them into *possessory* (§ 233) and *not possessory* <sup>d</sup> as with that into *duplicia* and *simplicia*. *Interdicta duplicia* are those in which, contrary to the ordinary rules of procedure, <sup>e</sup> the plaintiff can be condemned at the instance of the defendant. <sup>f</sup>

### § 64.

**Rights in rem and in personam.**—Those rights which can be enforced by an *actio in rem* are called *real* (*jus in re, in rem*), those which cannot are called *personal* (*jus in personam, ad rem*).<sup>g</sup> Real rights consequently include not merely those rights to things which can be enforced by an action available generally, but also all other rights upon which a *vindicatio* may be founded, such for example as the rights of paternal authority,<sup>h</sup> and of *status*; the so called *actiones prejudiciales*,<sup>i</sup> by which *status* is protected, being actions *in rem*.<sup>k</sup> It has, however, become usual to confine the

<sup>c</sup> Gaius IV. 140—142., compared with § 7. I. de interd. (4. 15.).

<sup>d</sup> For example Dig. lib. 43. tit. 29. 30.

<sup>e</sup> L. 1. de re iud. (42. 1.) L. 3. C. de sentent. (7. 45.)

<sup>f</sup> Gaius IV. 160. § 7. I. de interd. (4. 15.) compared with L. 13. 14. de iudic. (5. 1.) L. 10. fin. reg. (10. 1.) L. 3. § 1. uti poss. (43. 17.) L. 1. § 2. de superfic. (43. 18.). Buchholtz Versuche Nr. 9. Rudorff in Zeitschrift B. 9. Nr. 2.

<sup>g</sup> See upon this greatly disputed doctrine the references to § 62 and in addition; U. Huber Digress. L. 4. c. 10. H. Hahn de iure rerum et iuris in re speciebus, recus. c. adversar. scriptis et dissertat. apologet. Helmst. 1664. C. Thomasi D. vindicie domin. contra servitutum. At the end of his philosoph. iur. in doctrin. de O. et A. Majer Autonomie. Tübing. 1782. 22—75. J. T. Reinhard vom Eigenthumsrecht. Leipz. 1800. Bericht. u. Zus. zu den Inst. des R. R. p. 110 &c. Unterholzner jurist. Abhandl. p. 94 &c. G. A. W. Du Roi specimen observatt. de iure in re. Heidelberg. 1812. Schweppe Magaz. 1. St. 3—38. C. W. Hofstede D. qua notiones iuris in re et iuris ad rem ad principia sua revocantur. Groening. 1805. Balhorn gen. Rosen über dominium. Lemgo 1822. 156—162. J. A. F. v. Speckner über Rechtsdinglichkeit. München 1823. Seuffert Erört. Abth. 1. Nr. 8. F. v. Thaden Begriff des röm. Interdiktenbesitzes. Hamburg 1833. p. 93, &c. Fritz Erläuterungen 2. Hft. p. 244, &c. Sintenis Civilrecht B. 1. § 29. Note 4. Vangerow Leitfaden § 113.

<sup>h</sup> L. 1. § 2. de R. V. (6. 1.).

<sup>i</sup> L. 13. I. de act. (4. 6.). I. Raevardi de praeiudiciis Libri 2. Brug. Flandror. 1565. Schmidt v. Klagen § 218—419. the authorities there referred to.

<sup>k</sup> Thibaut Vers. 2. Bd. 47. See the authors mentioned in note g and;

expression real rights or *jura in re* to those rights to *things* which can be made the foundation of an *actio in rem*. Such a right, if exercisable over another's property (*in re aliena*), is emphatically styled *jus* by the Romans,<sup>1</sup> whilst what is in modern times called a personal right is denoted by them by the word *obligatio*: this word, however, expresses not only the right, but also and at the same time the duty correlative to it.<sup>m</sup>

### § 65.

**Punishments.**—Another division of actions, and one which is of the greatest importance in all branches of the civil law, is based upon this—namely, that certain actions are brought for the purpose of punishing a wrong doer, whilst others are brought for the purpose of obtaining that to which the plaintiff has a right. In order that this division may be properly understood, the following remarks seem requisite.

### § 66.

**Offences, &c.**—A law which commands or forbids the performance of a certain act either does so simply, or it annexes to its transgression some pain or penalty as a consequence thereof: the pain or penalty is called a *punishment*, the law imposing it is termed a *criminal* or *penal law*, and the transgression of such a law an *offence*.\*

### § 67.

**Public and Private.**—Penalties and offences are either public or private, according as they are inflicted and punished by the state, acting for the good of the whole community, or by the injured

F. A. Hommel D. quinque iur. in re species, quas vulgo tradunt, nec semper tales esse, nec solas. Lips. 1736. H. Kellinghusen de legib. nonnullis Romanor. cap. 21. (in Oelrichs Thes. nov. T. 2. Vol. 2. No. 1.) D. Nettelblatt de iure in re quae est res nullius. Hal. 1779.

<sup>1</sup> L. 30. de noxal. act. (9. 4.) L. 13. § 1. L. 19. pr. de damn. infect. (39. 2.). This is also the case with the German word *Gerechtigkeiten*. Savigny System B. 5. § 207.

<sup>m</sup> See above § 1. Note a.

\* The translator has rendered the German word *Verbrechen* by *offence* rather than by *crime*, inasmuch as the author in the following sections divides *Verbrechen* into public and private, terms which could not, it is conceived, be appropriately applied to the English word *crime*.

party himself, who is in a position to enforce the penalty as a compensation for a wrong he has suffered. Public offences are divided by the Romans into *publica* or *ordinaria*, and *extraordinaria*, according as the penalty is or not fixed by a comitial law.<sup>a</sup> The consideration of public offences or crimes does not fall within the scope of the present work, and in this place only those principles relating to private offences which are of the most importance and general application can be noticed.

### § 68.

**Actions Criminal and Civil.**—An offence may render a person obnoxious both to a public and to a private penalty,<sup>o</sup> and the offender may also be compellable to make compensation for the injury he has caused. The duty of making compensation to another can, however, also arise otherwise than from the commission of an offence.

All actions may be divided into Public or Criminal prosecutions (*accusationes*) and Private suits: the former are instituted with a view to a public penalty,<sup>p</sup> and can be commenced by any body; <sup>q</sup> the latter are

1. *Actiones rei persecutorie*, if instituted merely to enforce a right and irrespectively of the mode in which the liability of the person sued arose, whether in consequence of an offence or not; <sup>r</sup>

2. *Actiones penales*,<sup>s</sup> if instituted merely to enforce a penalty to which the person sued has become liable; <sup>t</sup> or,

<sup>a</sup> L. 1. de publ. iudic. (48. 1.) L. 3. § 2. de praevaricat. (47. 15). L. 3. de extraord. crim. (47. 11.). G. L. Boehmer de abigatu et furto equor. cap. 1 § 1—7. (Elect. T. 3. n. 21.).

<sup>o</sup> L. 92. de furtis (47. 2.).

<sup>p</sup> They must as a general rule be brought within 20 years. L. 3. de requir. reis (48. 17.) L. 12. C. ad leg. Corn. de falsis (9. 22.). See especially C. A. Gründler v. d. Verjährung d. peinel. Strafe. Halle 1796. Kori Theorie d. Verjährung. Leipz. 1811. Unterholzner Schuldverhältnisse B. 2. § 304—315.

<sup>q</sup> L. 30. § 3. de iureiur. (12. 2.). I. Finestres in Hermogeniano L. 2. ad L. 32. de obl. et act.

<sup>r</sup> See for example Tit. D. de condict. furtiv. (13. 1.). Schilling Institut. B. 2. § 105.

<sup>s</sup> Savigny System B. 5. § 210—212.

<sup>t</sup> See for example L. 5. § 5. 6. 13. de his qui effuder. (9. 3.). Sintenis Civilrecht B. 1. § 29.

3. *Actiones mixtæ* if instituted partly for the former,<sup>a</sup> and partly for the latter purpose.<sup>x</sup>

Distinguishable from public and private actions are the *actiones populares* which can be instituted by any member of the community not with a view to enforce a public penalty, but in order either to obtain the amount of a penalty for himself, or merely to compel restitution.<sup>y</sup>

### § 69.

**Private Penalties.**—The private penalties of the Romans are very various. Sometimes the injured party is entitled to an arbitrary sum,<sup>z</sup> at others only to a fixed sum of money, and this again may be a sum settled beforehand,<sup>a</sup> or the amount,<sup>b</sup> or twice,<sup>c</sup> thrice,<sup>d</sup> or quadruple the amount of loss sustained.<sup>e</sup> There are moreover other penalties (mentioned in other parts of the System in the proper place), as for example, the loss of a right to sue,<sup>f</sup> or of the possession of a thing,<sup>g</sup> or of the right to put in an *exceptio*.<sup>h</sup> According to the opinion of most persons (but which is still controverted and is not founded upon any sufficient reason), no action can now be instituted for the mere purpose of enforcing a private penalty;<sup>i</sup> and although certain persons main-

<sup>a</sup> But see Kierulff Theorie B. 1. p. 229. Note \*. Compare Savigny System B. 5. § 211. Note 1.

<sup>x</sup> § 18. I. de act. (4. 6.).

<sup>y</sup> Tit. D. de popular. act. (47. 23.) compared with L. 7. pr. de iurisdiet. (2. 1.) L. 1. pr. L. 5. § 13. de deictis (9. 3.) L. 25. § 2. ad Sct. Silan. (20. 5.) L. 1. de locis (43. 7.) L. 2. § 34. ne quid in loc. publ. (43. 8.) L. 1. pr. L. 3 § 9. de libero hom. (43. 29.). Savigny System B. 2. § 73.

<sup>z</sup> § 7. I. de iniur. (4. 4.). L. 5. § 1. ne quis eum, qui in ius vocat. (2. 7.).

<sup>a</sup> L. 7. pr. de iurisdiet. (2. 1.).

<sup>b</sup> L. 7. i. f. C. unde vi (8. 4.).

<sup>c</sup> § 5. I. de obl. quæ ex delict. (4. 1.). Nov. 18. cap. 8.

<sup>d</sup> § 24. I. de act. (4. 6.). Nov. 124. c. 2.

<sup>e</sup> § 5. I. de obl. quæ ex delict. (4. 1.).

<sup>f</sup> Nov. 72. cap. 4.

<sup>g</sup> L. ult. de R. V. (6. 1.) Nov. 18. c. 10.

<sup>h</sup> Auth. Contra C. de non num. pecun. (4. 30.).

<sup>i</sup> Höpfner Comm. § 1127. Glück Pand. 3. Th. § 274. 275., comp. with Malblanc princ. iur. Rom. § 358. C. G. A. Gruner de poenis Romanorum

tain that the remaining private penalties of the Romans are also now antiquated, their opinion rests on grounds wholly arbitrary and is certainly not held universally.<sup>k</sup> Those very actions, moreover, for purely private penalties which are considered by such persons to have gone out of use, are allowed even by them to be maintainable in certain exceptional cases; as where, in consequence of public penalties having ceased to be enforceable, the retention of the Roman law is necessary for the prevention of an offence.<sup>l</sup>

### § 70.

**Concurrence of Actions.**—The above divisions of actions are very important with reference to the law which governs their concurrence, and to the question what actions are and what are not maintainable by and against heirs. The law relating to the concurrence of actions<sup>m</sup> depends upon the following principles;

I. If the concurrence is *subjective*, i.e. if a multiplicity of actions is occasioned by a multiplicity of plaintiffs or defendants, all the actions are maintainable simultaneously or successively,<sup>n</sup> unless indeed the case be such that satisfaction by one of the defendants discharges the others from their liabilities.<sup>o</sup>

*privatis earumque usu hodierno.* Lips. 1805. in C. Martin Select. Diss. et Comm. Coll. Vol. I. Ienae 1822. Nr. 2.

<sup>k</sup> Malblanc doct. de iureiur. § 73. and *contra*, Cocceii I. C. L. 18. T. 4. qu. 27. Danz. ord. Proc. § 335 a. E. Wehrn v. gerichtl. Einwend. § 60.

<sup>l</sup> See for example Glück Pand. 5. Thl. § 430.

<sup>m</sup> Averan. interpr. L. 3. c. 14. 15. I. Finestres et de Monsalvo D. de concurr. action. ad L. 32. de O. et. A. in Hermogen. T. 1. p. 601. H. a Vianen de concurs. act. Trai. ad Rh. 1736. (Oelrichs Th. nov. V. 1. Th. 1. Nr. 4.). F. Alef. de electivo quem vocant actionum concursu. Heidelb. 1757. Schmidt Lehrb. v. d. Kl. § 16. 60. 106. Thibaut civilist. Abh. 146—204. Archiv f. civil. Prax. B. 2. Nr. 23. Zimmern v. den Noxalklagen. 238—280. Keller über Litiscontestation. 449—496. A. O. Krug selecta de condict. furtiva capita. Lips. 1830. cap. III. W. H. Puchta über die gerichtl. Klagen. Giess. 1833. § 29—38. Göschen Civilrecht. B. 1. § 156—159. Kierulff Theorie. Altona 1839. B. 1. p. 241—269. Savigny System B. 5. § 231—286., who disapproves of the above division into subjective and objective concurrence.

<sup>n</sup> § 2. I. de iniur. (4. 4.) L. 1. § 9. L. 34. L. 41. eod. (47. 10.) L. 5. pr. de nox. act. (9. 4.). Against principals and sureties only successively.

<sup>o</sup> L. 5. § 15. commodati (13. 6.) L. 1. § 43. depositi (16. 3.). L. 6. quod vi aut clam. (43. 24.) L. 9. pr. de duob. reis (45. 2.).



II. If the concurrence is *objective*, i.e. if one person has several actions against one other, the following cases must be distinguished :

A. If the objects of the actions are essentially different ; and

a. The plaintiff succeeds in one action : he can nevertheless proceed with the other actions,<sup>p</sup> unless the ground of the one is destroyed by that of the other.<sup>q</sup> Consequently all *actiones rei persecutoriae* are, if their grounds be different, maintainable one after the other ;<sup>r</sup> and the same is true of several but different *actiones penales*,<sup>s</sup> and of *actiones rei persecutoriae* combined with either public<sup>t</sup> or private penal actions.<sup>u</sup> But if by law the actions are only given alternatively one destroys all the others.<sup>x</sup> This is the case when there is concurrence between actions for public and private penalties.<sup>y</sup>

b. The plaintiff is unsuccessful in one action (tried on its merits) : the other actions are maintainable so far as they rest on different grounds, but no further.<sup>z</sup>

c. The plaintiff abandons the action he has brought : although he cannot again institute this action, every other remains open to him.<sup>a</sup>

<sup>p</sup> L. 5. § 1. ad leg. Aquil. (9. 2.) L. 9. § 1. i. f. de tribut. (14. 4).

<sup>q</sup> L. 8. § 10. L. 12. § 1. L. 32. § 1. de inoff. test. (5. 2.) L. 43. § 6. de aed. ed. (21. 1.).

<sup>r</sup> L. 23. § 5. de rei vind. (6. 1.) L. 16. 18. de except. (44. 1.).

<sup>s</sup> §. 1. I. si quadrupes (4. 9.) L. 32. L. 34. pr. L. 60. de O. et A. (44. 7.) L. 15. § 46. de iniur. (47. 10.) L. 6. pr. ad l. Iul. de adult. (48. 5.) L. 130. de R. I. (50. 17.). Glück Pand. B. 4. § 284 a. Note 17. 27. Brackenhöft Identität u. Connexität der Rechtsverhältnisse. Gött. 1839. p. 333. Savigny *loc. cit.* § 234.

<sup>t</sup> L. 4. § 4. fin. reg. (10. 1.) L. 3. § 6. de tab. exhib. (43. 5.) L. un. C. quando civil. actio. (9. 31.) L. 9. § 5. de publican. (39. 4.).

<sup>u</sup> § ult. I. de obl. quae ex del. (4. 1.) § 18. I. de act. (4. 6.) L. 9. pr. L. 11. § 2. de servo corr. (11. 3.) L. 7. § 1. de cond. furt. (13. 1.) L. 2. § 10. 26. vi bon. rapt. (47. 8.). Savigny *loc. cit.* § 234. Note z.

<sup>x</sup> L. 4. § 2. L. 7. de lege comm. (18. 3.) L. 84. § 13. de leg. I. (30.) L. 4. C. de pactis inter (4. 54.) L. 1. C. de furtis (6. 2.) L. 8. pr. C. de edicill. (6. 36.).

<sup>y</sup> § 10. I. de iniur. (4. 4.) L. 6. D. eod. (47. 10.) L. 56. § 1. de furt. (47. 2.)

<sup>z</sup> L. 6. § 4. nautae (4. 9.) L. 93. § 1. de leg. 3. (32.) L. 28. § ult. de liberat. legat. (34. 3.) L. 11. § 4. L. 14. § 2. de except. rei iud. (44. 2.).

<sup>a</sup> arg. L. 4. C. de pactis (2. 3.) L. 11. C. de R. C. (4. 1.) cap. 20. X. de off. iud. (1. 29.).

B. If the objects of the actions are essentially the same ; and

a. The plaintiff is successful in one : the others are not maintainable,<sup>b</sup> unless some further advantage, the obtaining of which has not become impossible by the result of the first action,<sup>c</sup> remains to be acquired.<sup>d</sup>

b. The plaintiff abandons or is unsuccessful in the action instituted by him : the other actions are maintainable if founded on a different <sup>e</sup> but not if founded on the same ground.<sup>f</sup>

### § 71.

**Actions by and against heirs.**—With respect to the question what actions are maintainable by heirs (*translatio activa*) and what against them (*translatio passiva*)<sup>g</sup> it is a fundamental principle that, as a general rule, heirs can both sue and be sued as such.<sup>h</sup> Even in exceptional cases this principle is applicable if *litis contestatio* has taken place<sup>k</sup> (or according to the modern German law if the action has been commenced<sup>l</sup>) in the life-time of the deceased and if the pursuance of the right by or against heirs is neither *per se* impossible nor specially forbidden by law.

<sup>b</sup> L. 9. § 1. de tribut. (14. 4.) L. 41. pro socio (17. 2.) L. 15. § 12. quod vi aut clam. (43. 24.) L. 12—L. 14. pr. de exe. rei iud. (44. 2.) L. 9. § 1. de furtis (47. 2.) L. 43. § 1. L. 57. de R. I. (50. 17.).

<sup>c</sup> As is the case if an *actio mixta* is brought before an *actio rei persecutoria*. L. 9. § 6. L. 14. § 13. quod metus (4. 2.). Cuiacii Obs. L. 8. c. 33.

<sup>d</sup> L. 43. 47. pr. pro socio (17. 2.) L. 28. de A. E. (19. 1.) L. 7. § 1. commod. (13. 6.) L. 32. L. 34. pr. § 2. de O. et A. (44. 7.) L. 2. § 3. de priv. del. (47. 1.) L. 1. 11. arb. furt. caes. (47. 7.). Vianen l. c. c. 2. § 4—11. Glück Pand. B. 4. § 284 d. Note 74.

<sup>e</sup> L. 13. pr. de inst. act. (14. 3.) L. 31. § 16. L. 48. § 7. de acdil. ed. (21. 1.) L. 93. § 1. de leg. III. (32.) L. 11. pr. de exe. rei iud. (44. 2.) L. 18. de O. et A. (44. 7.). L. 14. C. de inoff. test. (3. 28.).

<sup>f</sup> L. 28. § 6. de iureiur. (12. 2.) L. 76. § 8. de legat. 2. (31.) L. 9. § 1. de furt. (47. 2.) L. 9. arb. furt. caes. (47. 7.).

<sup>g</sup> *Lyclama benedictor*. Libri IV. Lugd. Bat. 1617. W. A. Lauterbach de transitione act. Tub. 1653. (Diss. Vol. 3.). Compare Froben § 70. Kierulff Theorie B. 1. 215—229. Savigny System B. 5. § 230.

<sup>h</sup> Actions arising out of family relations are exceptions.

<sup>i</sup> *Sintenis Erläut. des Civilproc.* 1839. 146.

<sup>j</sup> L. 26. L. 58. de O. et A. (44. 7.) L. 139. pr. 164. de R. I. (50. 17.) L. 6. § ult. L. 7. de inoff. test. (5. 2.) L. un. C. ex delicto defunct. (4. 17.) compared with the K. G. O. of 1555. Thl. II. Tit. 9. § 6. Francke Beitr. 1. Abtheil. 43. 44.

With respect to the exceptional cases the following rules are laid down.

I. There is no *translatio activa*, or in other words heirs as such cannot sue—

1. In those cases in which the right to be protected ceases with the life of the deceased.<sup>l</sup>

2. In criminal actions.<sup>m</sup>

3. In popular actions.<sup>n</sup>

4. In certain private penal actions,<sup>o</sup> nor in the so called *actiones meram vindictam spirantes*, i.e. those which are maintainable, even in the absence of any actual damage to property, for the purpose of punishment.<sup>p</sup>

II. There is no *translatio passiva*, or in other words heirs as such cannot be sued—

1. In those cases in which the grounds of action do not survive as against them; but heirs are clearly answerable in respect of liabilities actually incurred by the deceased.<sup>q</sup>\*

2. In criminal actions.<sup>r</sup>

3. In popular actions.<sup>s</sup>

<sup>l</sup> See Thib. Syst. § 434. 599. Lauterbach l. c.

<sup>m</sup> L. 3. § 4. de accus. (48. 2.) L. 10. pr. ad. SCt. Turpill. (48. 16.) L. ult. C. si reus (9. 6.).

<sup>n</sup> L. 5. § 5. de his qui effud. (9. 3.) L. 7. § 1. de popul. act. (47. 23.) L. 12. pr. de V. S. (50. 16.).

<sup>o</sup> § 1. I. de perp. act. (4. 12.) comp. with L. 4. de calumn. (3. 6.) L. 9. de religio. (11. 7.). Kierulff Theorie B. 1. 228.

<sup>p</sup> Theophilus L. 4. T. 12. § 1. L. penult. de in ius voc. (2. 4.) L. 13. pr. de iniur. (47. 10.) L. 10. de sep. viol. (47. 12.) L. 15. § 1. sol. matr. (24. 3.) L. 7. C. de revoc. don. (8. 56.). Grolman & Löhr Magaz. 4. B. 363—366.

<sup>q</sup> L. 42. 52. 55. de R. V. (6. 1.) L. 2. C. si unus et plur. her. (8. 32.). Lauterbach Th. 8. 20. [\* An example will explain the meaning of the passage in the text. A person dies wrongfully possessed of property, but of which his heir never takes possession; an action to recover possession might have been brought against the deceased, but could not be maintainable against his heir; but an action would lie against the latter in respect of any liability the deceased might have incurred by having been in possession. *Trans.*]

<sup>r</sup> L. 20. de poen. (48. 19.). H. de Cocceii de cess. eor. quae ad her. non trans. c. 4. § 21.

<sup>s</sup> L. 5. § 5. 13. de effusis (9. 3.) L. ult. de popul. act. (47. 23.). Lauterbach Th. 26. Voet L. 43. T. 13.

4. In purely private penal actions, or in those in which revenge is the sole object.<sup>1</sup>

5. In an *actio rei persecutoria* founded on an illegal transaction; for then, unless an *actio ex contractu* is maintainable, heirs are not answerable by the Roman law to a greater extent than they have profited by the wrong;<sup>2</sup> by the Canon law, however, they are answerable unconditionally, or at all events to the amount of the value of the inheritance descended to them.

In case of an *actio mixta* the principles relating to *actiones pœnales* and *actiones rei persecutoriæ*, respectively, must be applied,<sup>3</sup> unless some special reason to the contrary can be shown.<sup>4</sup>

### § 72.

**Actiones bonæ fidei, &c.**—In all actions as a general rule that result can be obtained which is conformable to equity and the nature of the circumstances. Those actions only which are founded on events in which formal words are used are strictly confined to that which is included in the very words of the formula. Hence arose the now practically useless<sup>b</sup> division of actions into

<sup>1</sup> § 1. I. de perp. act. (4. 12.) L. 24. de in ius voc. (2. 4) L. 10. § 2. si quis caut. (2. 11.) L. 1. pr. de priv. del. (47. 1.) L. 111. pr. de R. I. (50. 17.) L. 5. § 4. si quis cum (2. 7.) L. 13. pr. de iniur. (47. 10.) L. 7. C. de revoc. don. (8. 56.).

<sup>2</sup> L. 35. 36. pro soc. (17. 2.).

<sup>3</sup> L. 16. § 2. quod m. c. (4. 2.) L. 13. pr. L. 17. § 1. L. 26. de dolo (4. 3.) L. 52. de R. V. (6. 1.) L. 9. § 8. L. 10. de reb. auct. iud. (42. 5.) L. 3. pr. de vi (43. 16.) L. 44. de R. I. (50. 17.). See, for the different views upon this subject, Cuiac. Obs. L. 7. c. 37. Lyclama membr. L. 1. c. 89. Duirsema coniectur. L. 1. c. 7. 8. Costa ad Tit. C. ex. delict. defunctor. (Meerman Thes. T. 1.) Upon the case in which an *actio ex contractu ob dolum* is maintainable, I formerly adopted the view taken by Costa ad Inst. L. 4. Tit. 12. § 1. but for the reasons given by Francke Beitr. 9—28. I have since abandoned it.

<sup>4</sup> c. 3. C. 16. qu. 6. cap. 14. X. de sepult. (3. 28.) cap. 5. X. de raptor. (5. 17.) cap. 9. X. de usur. (5. 19.) cap. 28. X. de sentent. ex commun. (5. 39.). But see Löhr Theorie der Culpa. § 113. Rosshirt Zeitschrift B. 2. 436. and contra Francke loc. cit. 44—57.

<sup>a</sup> L. 4. § 2. de incendio (47. 9.).

<sup>b</sup> L. 2. § ult. de vi bon. rapt. (47. 8.). Lauterbach Th. 23. 24.

<sup>c</sup> Höpfner Comment. § 1135. Savigny System B. 5. § 224.

*bonæ fidei* and *stricti juris*.<sup>c</sup> The former must not be confounded with *actiones arbitrarie*, by which are understood either those actions in which every thing essential is left to the discretion of the judge, or those in which he can, in case his decree is not obeyed, condemn the defendant in a further sum.<sup>d</sup>

### § 73.

**Other sorts of Actions.**—All actions which can be brought within the express provisions of law are termed *vulgares*,<sup>e</sup> *nominatæ*, or if expressly given by law, *directæ*,<sup>f</sup> but if founded upon principles of equity, opposed to the strict rules of law, or upon an extended construction of them, *actiones utiles*.<sup>g</sup> Direct actions are either designated in laws by some special name or not; in the latter case actions *in personam* are for convenience referred to by naming the law which gives them,<sup>h</sup> (e.g. *condictio ex lege*, *canone*, *statuto*,

<sup>c</sup> L. 5. pr. § 4. de in lit. iur. (12. 3.) L. 3. § 2. commodati (13. 6.) L. un. § 2. C. de rei ux. (5. 13.) § 28. I. de act. 4. 6. The former belong to the *arbitria*, these to the *judicia*, according to Cicero pro. Rose. Com. c. 4., Boethius topica Ciceron. 6., Seneca de benefic. 3. 7. and Quintilian. inst. orat. IV. 2. I. H. Boehmer de act. Sect. 1. c. 3. § 19. Höpfner Comment. § 1128—1135. Totally different views are adopted by E. Gans Römisches Obligationenrecht. Heidelb. 1819. Mühlenbruch Heidelberg. Jahrb. 1821. Nr. 5. 6. H. C. Stever de summario Romanorum iudicio seu stricti iuris et bonæ fidei actionibus. Lips. 1822. J. Rubo Erkl. der L. 2. 3. 4. 85. de V. O. Berlin 1822. Keller Litiscontestation. Zürich 1827. p. 189—192. Mayer Litiscontestation. 1. Abthl. Stuttg. 1830. p. 73—117. Rosshirt Zeitschr. 1. Hft. 71—90. Savigny System B. 5. § 218—220. and Beilage XIII.

<sup>d</sup> L. 3. de eo quod certo loco (13. 4.) L. 2 § 1. de in lit. iur. (12. 3.) L. 73. de fideiuss. (46. 1.) § 31. I. de act. (4. 6.) et Theophilus paraphr. ibid. Opinions upon this subject differ. See I. M. Magni ration. et different. iur. civ. lib. 1. de act. arbitrariis. Anjou. 1602. Orl. 1605. (Meerman Th. T. 3.). G. de Gast de act. arbitraria. Orl. 1576. (Meerman Th. T. 6.). A. Faber err. pragm. P. 4. Dec. 89. er. 4—10. Mühlenbruch Pand. B. 1. § 138. Savigny System B. 5. § 221—223. Unterholzner Schuldverhältnisse B. 1. § 167.

<sup>e</sup> L. 46. de her. inst. 28. 5.

<sup>f</sup> § 4. I. de act. (4. 6.) L. 37. pr. de O. et A. (44. 7.).

<sup>g</sup> L. 21. de praeser. verb. (19. 5) § 4. I. de fid. her. (2. 23.) § 16. I. de leg. aquil. (4. 3.) L. 16. pr. de pact. (2. 14.) Schulting Th. contr. D. 66. Th. 1. Heineccii hist. iur. L. 1. § 50.

<sup>h</sup> L. un. de cond. ex lege (13. 2.) L. 28. ad l'g. Iul. de adult. (48. 5.) § 24. I. de act. (4. 6.) L. 12. § 1. C. de pet. her. (3. 31.). Schmidt v. d. Kl. u.

*moribus*.) or by the first words of that law. If, on the other hand, an action is not founded upon any law in particular, but rests essentially upon equitable considerations, it is termed *in factum*, *utilis*, or *in factum utilis*,<sup>1</sup> or in modern times *imploratio officii judicis*.<sup>k</sup> Sometimes an adjective is used to show more clearly either the object of the action, as for example *actio ex stipulatu CERTI, INCERTI, TRITICARIA* (§ 168) or its foundation, e.g. *actio certi QUOD JUSSU*: where this is the case the actions are sometimes termed *actiones adjectitiæ qualitatis*.<sup>l</sup>

## B. EXCEPTIO.

### § 74.

**Plea.**—If a person seeks to defend himself against the consequences of an action instituted against him, he does so by what is termed generally a plea (*exceptio, præscriptio*).<sup>m</sup> The defence may amount either to a temporary or a perpetual bar to the action; in the former case the plea is called *dilatory (exceptio dilatoria)*, in the latter case the plea either denies the existence of the ground of action, or admitting such existence opposes something to it which destroys it; in the first of these two cases there is what is called a *litis contestatio negativa*<sup>n</sup> and in the second an *exceptio*

Einr. § 1338. 1339. Westenberg de caus. oblig. Diss. 4. See too, Gans *loc. cit.* 160—165. Savigny System B. 5. Beilage XIV. § 12—14.

<sup>1</sup> L. 12. de in ius voc. (2. 4.) L. 5. § 3. ne quis eum (2. 7.) L. 7. § 1. de religiosis (11. 7.) L. 1. pr. L. 11. de præser. verb. (19. 5.) L. 26. § 3. de pact. dot. (23. 4.) E. F. G. Meister de in factum action. (op. n. 7.) Gans *loc. cit.* 136—152. Savigny System B. 5. § 217. See as to the *in factum civile* or *præscriptis verbis actiones* Thib. Syst. § 393.

<sup>k</sup> F. A. Kuenhold de remed. implor. offic. iudic. action. forens. vicario. Lips. 1720.

<sup>l</sup> This division arose from L. 5. § 1. de exerc. act. (14. 1.). Compare L. E. Hertius de action. adiect. qualit. Giess. 1699. Cocceii I. C. L. 12. T. 6. qu. 3. L. 13. T. 3. qu. 1. Pufendorf T. 2. Obs. 41. Bericht. und Zusätze zu den Inst. des Röm. Rechts. 84—88. Gluck Pand. 14. B. § 876. O. Bachmann de action. adiect. qual. Lips. 1843.

<sup>m</sup> L. 2. pr. L. 11. L. 23. de except. (44. 1.) L. 12. de div. temp. (41. 3.). For the principal old authorities see Schmidt v. d. Klagen § 5. 6. 7. See too J. A. M. Albrecht die Exceptionen des gemeinen Civilprozesses. Munich 1835. Weiske Rechtslexicon B. 3. 673—809.

<sup>n</sup> For what is known respecting the Roman *litis contestatio*, the reader is

*peremptoria*,<sup>o</sup> in the strict sense of that expression. There are no pleas which are of a mixed character, that is which offer at one and the same time only a temporary and a perpetual defence; what are called mixed pleas<sup>p</sup> are those which offer a defence itself only temporary, but capable of leading to one which is perpetual if the action be further prosecuted.

#### § 75.

Considered with reference to their extent,<sup>q</sup> pleas are either *in rem* (*rei coherentes*) or *in personam* (*personæ coherentes*); the latter are pleas which can only be made use of by certain particular persons, or against persons between whom and the defendant there is some *obligatio*; <sup>r</sup> the former are pleas which can be used by all persons incidentally interested in, or who may acquire the right sought to be protected, or which can be used against any person whatever; in the latter case the pleas are also called *populares* or *vulgares*.<sup>s</sup> There is no presumption that a plea is personal.<sup>t</sup> Pleas moreover, like actions, are called *certæ*, *nominatæ* or *incertæ*, *in factum*, *utiles*.<sup>u</sup>

#### § 76.

**Replication, &c.**—Exactly as a defendant may oppose the plaintiff's action by a plea, may the plaintiff answer his opponent's

referred to Keller and Mayer in § 73. Note c. cit. For the modern notion of Rosshirt see his Zeitschrift B. 2. 336—349. Blätter für Rechtsanwendung. Erlang. 1838. p. 17. 33.

<sup>o</sup> At least in the phraseology of our practitioners. The common Roman notion extends only to a destruction by the presumption of an independent right. L. 3. de except. (44. 1.) § 8. 9. 10. I. eod. (4. 13.), compared with L. 16. de public. (6. 2.) L. 24. de exc. rei. iudic. (44. 2.). Savigny System B. 5. § 227.

<sup>p</sup> Danz §. 158. C. W. Wehrn v. gerichtl. Einw. Leipz. 1790. § 9.

<sup>q</sup> L. 7. de except. (44. 1.).

<sup>r</sup> L. 2. §. 1. 2. L. 4. § 20. de dol. mal. et met. exc. (44. 4.).

<sup>s</sup> Fragm. Vatican. §. 266. L. 3. pr. de popular. act. (47. 23.). Schroeter obs. iur. civ. Ien. 1826. p. 87—102.

<sup>t</sup> §. ult. I. de replic. (4. 14.) L. 2. § 2. L. 4. § 33. de dol. mal. et met. except. (44. 4.) Savigny System B. 5. § 227. Not. x.

<sup>u</sup> § 1. I. de except. (4. 13.) L. 14. 23. de except. (44. 1.) L. 4. § 16. 32. de doli mal. et met. (44. 4.) L. 21. de præscr. verb. (19. 5.). Schilling Institut. B. 2. § 118.

plea either by denying the truth of the statement therein made, or by meeting such statement by another, which as in a plea may be either dilatory or peremptory. Such an answer to a plea is called a *replicatio*.<sup>x</sup> In opposition to the replication there may be again another denial or a further statement called in this case a *duplicatio*, bearing the same relation to the replication as that does to the *exceptio*; the *duplicatio* may be further followed by a *triplicatio*, and this again by a *quadruplicatio* and so on.<sup>y</sup>

#### IV.—RIGHT OF RENUNCIATION AND ALIENATION.

##### § 77.

Inasmuch as a right does not impose upon the person in whom it is vested any necessity of exercising it,<sup>z</sup> but merely gives him the power so to do, every person who is free to dispose of what is his may lawfully abstain from exercising his rights and may either wholly or in part renounce them.<sup>a</sup> No renunciation, however, which has given rise to rights in other persons can be recalled.<sup>b</sup> Renunciation is of course not to be presumed,<sup>c</sup> or extended further than it is clearly warranted by the words or conduct of the person renouncing.<sup>d</sup> An indefinite renunciation of every kind of defence is consequently to be treated as unmeaning.<sup>e</sup>

<sup>x</sup> Tit. I. de replic. (4. 14.) L. 2. § 1. 2. L. 22. § 1. de except. (44. 1.). Schilling *loc. cit.* §. 120.

<sup>y</sup> § 1. 2. I. de replic. (4. 14.) L. 2. § 3. de except. (44. 1.). Savigny System B. 5. § 229.

<sup>z</sup> L. un. C. ut nemo invitatus (3. 7.).

<sup>a</sup> L. 29. C. de pact. (2. 3.). Schilling *loc. cit.* § 96.

<sup>b</sup> L. 14. §. 9. de aedil. edict. (21. 1.) L. 4. C. de pact. (2. 3.) I. 11. C. de R. C. (4. 1.). cap. 3. X. de renunt. 1. 9. See Fritz Archiv. f. civil. Prax. B. 8. Nr. 15. Savigny System B. 4. § 202.

<sup>c</sup> L. 3. de testam. mil. (29. 1.).

<sup>d</sup> L. 8. pr. quemadm. serv. (8. 6.) cap. 20. X. de off. iud. (1. 29.). A. K. H. v. Hartitsch Entscheidungen praktischer Rechtsfragen. Leipz. 1840. No. 443.

<sup>e</sup> L. 4. §. 4. si quis caut. (2. 11.) L. ult. § 3. de cond. indeb. (12. 6.). Stryk cautel. contr. Sect. 1. cap. 5. § 2. 3. But see K. G. Neundorff Erörterungen. Tübing. 1807. Nr. 2.



## § 78.

Every one who can renounce a right can for that very reason part with it to any person capable of acquiring it,<sup>f</sup> but in order that a right may be aliened by one person to another, certain means must be taken which vary according to circumstances, and therefore can not with propriety be noticed in an exposition of general principles only.<sup>g</sup>

## DIVISION II. OF DUTIES.

## § 79.

**Exclusion of Freedom.**—A person obliged, being subject to law, cannot, merely of his own accord, either renounce his duty or transfer it to others,<sup>h</sup> and what he does contrary to any law whether prohibitory or mandatory is in cases of doubt to be held null and void;<sup>k</sup> but in matters of trifling moment this rule ought not to be strictly applied.<sup>i</sup> In case, however, anything is knowingly parted with contrary to law the giver himself<sup>l</sup> cannot recover it back,<sup>m</sup> unless indeed the very object of the law is to prevent him from impoverishing himself;<sup>n</sup> and even then an *actio in rem* cannot always be successfully resorted to by him.<sup>o</sup> Cases may

<sup>f</sup> Tit. I. quib. alienare lic. (2. 8.).

<sup>g</sup> See Thib. Syst. §§ 281. 314. 334. 460—466.

<sup>h</sup> L. 1. C. de novat. (8. 42.).

<sup>i</sup> L. 8. § 2. de procur. (3. 3.) L. 183. de R. I. (50. 17.) L. 7. C. de procur. (2. 13.).

<sup>k</sup> L. 5. C. de LL. (1. 14.). Cuia. obs. L. 19. c. 3. Weber nat. Verb. § 64. 74. See *contra* Vinnius quaest. sel. L. 1. c. 1. Voet L. 1. T. 3. nr. 16. Hommel rhapsod. obs. 213. Pütter theor. general. de nullitatibus (in opus. § 17. 20.).

<sup>l</sup> The national exchequer has a right to every immoral gift. L. 5. pr. de calumniator. (3. 6.) L. 8. § 14. de inofficios. (5. 2.) L. 2. § 1. de his quae ut indign. (34. 9.) L. 1. pr. L. 9. L. 46. § 2. de iure fisci (49. 14.).

<sup>m</sup> L. 25. pr. de adopt. (1. 7.) Tit. Dig. de condict. ob turp. caus. (12. 5.). Weber *ubi supra* § 48. 74—76. 91. Rosshirt Zeitschr. B. 1. 129—142.

<sup>n</sup> This principle is obtained by inference and is everywhere as in cap. 33. X. de iureiur. (2. 24.) recognised as law. See §§ 178. 505. Weber *loc. cit.* does not go quite so far.

<sup>o</sup> *contra* Brandis in Linde Zeitschrift B. 7. 180—188. But see § 14. I. de act. 4. 6. compared with tit. Dig. de cond. ob. turp. caus. (12. 5.). Froben § 78.

moreover occur in which only certain persons can dispute the validity of a transaction, or in which a duty exists only towards one of several contracting parties.<sup>p</sup>

### § 80.

A transaction void at its commencement cannot afterwards and by itself become valid;<sup>q</sup> for this purpose some new circumstance must occur by which the original defect is cured; one such circumstance of great importance and of various effects is subsequent assent (*ratihabitio*).<sup>r</sup>

If a person obliged has acted partly in non-conformity and partly in conformity with his duty, that part of the transaction which is invalid does not render the remainder so if the latter is separable from the former and is complete in itself.<sup>s</sup> So much moreover of the transaction as is valid may be upheld as a transaction different from that contemplated, and a new juridical transaction may arise, by what is termed a *conversio actus juridici*.<sup>t</sup>

### § 80 A.

**Alternative duties.**—In cases of alternative duties, however, i.e. where either this *or* that has to be done, the person obliged has a discretion, namely, a right of option,<sup>a</sup> and the same is true of those cases of simple duties, where the person entitled has only a single right whereon to sue, whilst the person obliged can success-

<sup>p</sup> pr. I. de auct. tut. (1. 21.) L. 34. § 3. de contr. emt. (18. 1.). Brandis *loc. cit.* Nr. 4. 5.

<sup>q</sup> L. 29. de R. I. (50. 17.) L. 83. § 5. de V. O. (45. 1.). Averanii int. L. 4. c. 22.

<sup>r</sup> See below § 190. G. G. Busse de ratihabitione. Lips. 1834.

<sup>s</sup> L. 5. § 2. L. 31. § 4. de donat. int. V. et U. (24. 1.) L. 29. de usur. (22. 1.) L. un. pr. C. de rei ux. act. (5. 13.). See especially G. L. Crell de fructu et effectu negotii inutilis, nulli et imperfecti, in his Diss. n. 9. Mühlenbruch Pand. 1. B. § 113. The exceptions will be noticed in their proper place.

<sup>t</sup> L. 1. § 4. de pec. const. (13. 5.) L. 5. pr. de resc. vend. (18. 5.) L. 41. § 3. de vulg. et pup. (28. 6.) L. 8. pr. de acceptil. (46. 4). Hofacker princ. iur. R. G. T. I. § 221.

<sup>a</sup> L. 34. § 6. de contr. emt. (18. 1.) L. 10. §. 6. de iure dot. (23. 3).

fully defend an action, founded on that right, upon the ground of performance of something other than the immediate object of the action.<sup>b</sup>

In cases of doubt the option rests with the person obliged,<sup>c</sup> even where a claim is made by him for the recovery back of an excess of payment;<sup>d</sup> but it is otherwise where a joint duty has been performed by each of the persons in whom it resided;<sup>e</sup> and under special circumstances the option may rest with the person entitled.<sup>f</sup>

The right of choice, in cases of doubt, descends upon the death of the person obliged to his representatives,<sup>g</sup> and similarly when vested in the person entitled, it descends on his death to his representatives, and can be exercised by them even when that right depends on agreement,<sup>h</sup> and notwithstanding the absence of all right of cession<sup>i</sup> (*System* § 460). If, however, one person has to choose for another, no choice can be made by the representatives of the former.<sup>k</sup>

#### § 80 B.

As regards their continuance and extinction, alternative duties are governed by the ordinary general principles. But they

<sup>b</sup> For example, L. 2. C. de resc. vend. (4. 44.) L. 9. L. 57. pr. de solut. (46. 3.). Cocceii I. C. L. 18. Tit. 5. qu. 9.

<sup>c</sup> L. 34. § 6. de contr. emt. (18. 1.) L. 138. § 1. de V. O. (45. 1.). Hert de electione ex obligat. alternativ. Sect. I. (in opusc. Vol. 1. T. 3.), especially I. A. Kurrer de obligat. alternativa. Tubing. 1686. Archiv für civilist. Prax. 1. B. Nr. 23. M. A. I. de Brassier Diss. de caussis alternativis. Heidelberg. 1821.

<sup>d</sup> L. 10. C. de cond. indeb. (4. 5.). Thomasius D. de promiss. rei incert. § 53. Voet L. 12. T. 6. nr. 5. Vangerow Leitfaden § 569.

<sup>e</sup> L. 21. de condict. indeb. (12. 6.) Kurrer l. c. cap. 7. n. 13. 14. Brassier, l. c. § 12.

<sup>f</sup> L. 10. § 6. de iuro dot. (23. 3.) L. 112. pr. de V. O. (45. 1.)

<sup>g</sup> Kurrer l. c. cap. 6. n. 82. 83.

<sup>h</sup> L. 76. pr. L. 141. pr. de V. O. (45. 1.). Kurrer l. c. n. 105—114. See *contra* Olea quaest. L. 1. n. 33. Donell comm. L. 15. c. 34. Mühlenbruch Cession § 24. p. 260—275.

<sup>i</sup> L. 75. § 3. de leg. 1. (30.) L. 19. de optione (33. 5.). Kurrer l. c. n. 97. Hert l. c. Sect. 4. § 1. See *contra* Hilliger in Don. enucl. L. 15. c. 2. lit. d. Hunnius resol. L. 3. Tr. 4. qu. 15. Thomasius l. c. § 6.

<sup>k</sup> L. ult. § 1. de V. O. (45. 1.) § 1. l. de emt. (3. 24.). Kurrer l. c. n. 98—102.

are also subject to this peculiarity, that the right to elect, which the person obliged has, is extinguished as soon as his choice is definitively made.<sup>1</sup> Moreover, where the object of the right is destroyed distinctions must be taken which have not to be made in ordinary cases. For,

I. In case the destruction cannot be imputed to either party, the person obliged is not wholly discharged, unless all the objects of the option are destroyed;<sup>m</sup> and this is so even if the person entitled has acquired one of the things in some other way.<sup>n</sup> If one only of the things is destroyed its value or the remaining thing must be given.<sup>o</sup>

II. In case destruction arose from the delay or some other act on the part of one of the parties, viz.:

A, on the part of the debtor; he must, of course, if all the things are destroyed, make adequate compensation. If one of them remains the creditor has the unconditional right of claiming it or the value of the thing destroyed, provided the option rests with him; but otherwise, at all events upon principle, he can only claim the still existing thing. He is not obliged to receive in satisfaction the value of the thing destroyed, even though equal to that of the other.<sup>p</sup>

B, on the part of the creditor; he can claim nothing, even though one only of the things is destroyed.<sup>q</sup>

#### § 80 c.

**Possibility of Performance.**—As nothing can be necessary which

<sup>1</sup> L. 84. § 9. de legat. I. (30.) L. 106. L. 112. pr. L. 138. § 1. de V. O. (45. 1.). Thomasius l. c. § 53. 54. *Contra* Fritz Erläut. Heft. 3. 11.

<sup>m</sup> L. 34. § 6. de contr. emt. (18. 1.) L. 2. § 3. de eo quod certo (13. 4.).

<sup>n</sup> L. 16. pr. de V. O. (45. 1.). I. A. Kurrer de obligatione alternativa. Tubing. 1686. n. 16—23.

<sup>o</sup> L. 47. § 3. de legat. I. (30.). Arch. f. c. Prax. B. 1. Nr. 23.

<sup>p</sup> This is certainly reasonable. M. A. J. Brassier Diss. de causis alternativis. Heidelberg 1821. § 5. Nevertheless considerable difficulty arises from L. 95. § 1. de solutt. (46. 3.) See Zeitschr. für Rechtspflege. Leipz. 1839. B. 2. Nr. 16.

<sup>q</sup> L. 105. de V. O. (45. 1.) L. 72. pr. de solutt. (46. 3.). Kurrer l. c. nr. 39—42. *Contra* Brassier l. c. § 10.

is not possible, every duty is extinguished when its performance becomes objectively impossible;<sup>1</sup> but the person obliged clearly becomes liable to a claim for damages if the impossibility arose from any fault imputable to him.<sup>2</sup>

### § 81.

**Strengthening of Duties.**—The binding nature of a duty or the inducement to fulfil it may be strengthened—

I. By solemnly swearing to perform the same (*Juramentum promissorium*). According to the Roman law the nature of the duty was not as a rule changed by such an act;<sup>3</sup> but according to the Canon law an oath cures any civil defect which might otherwise have been taken advantage of by the person swearing;<sup>4</sup> but it has no effect when used for an immoral purpose, or is opposed to the rights of third parties or of the state.<sup>5</sup>

II. By an undertaking entered into by the person obliged binding himself to pay, in case of non-performance of his duty, something by way of penalty (*pœna conventionalis*). The principal duty is not changed in nature by the annexation of such a promise,<sup>6</sup> but the inducement to fulfil it is increased, since unless the person obliged has reserved the option to himself,<sup>7</sup> he can be required at the option of the person entitled either to perform the principal duty or to pay the penalty,<sup>8</sup> or even both in case the agreement be to that effect, or the penalty be made payable in the

<sup>1</sup> L. 137. § 4. de V. O. (45. 1.). L. 185. de R. J. (50. 17.).

<sup>2</sup> L. 2. § 1. L. 3. de peric. (18. 6.). L. 95. § 1. de solut. (46. 3.).

<sup>3</sup> L. 7. § 16. de pact. (2. 14.) compared with L. 7. pr. § 1. de oper. libert. (38. 1.) L. 36. de manumiss. test. (40. 4.). Weiske Rechtslexikon B. 3. 643.

<sup>4</sup> c. 14. 15. C. 22. qu. 5. cap. 28. X. de iureiur. (2. 24.). Thibaut logische Ausl. § 16. F. J. Müller de iureiurando. Bonnae 1831. § 42. See *contra* Weber. natürl. Verb. § 120.

<sup>5</sup> cap. 23. X. eod. (2. 24.) cap. 2. de pact. in 6. (1. 18.).

<sup>6</sup> L. 61. L. 69. de V. O. (45. 1.) L. 1. C. de recept. (2. 56.). Bach de poena convent. (in opusc.). C. F. Kersten de eod. arg. Lips. 1839. Unterholzner Schuldverhältnisse B. 1. § 121—124. Fritz Erläut. Hft. 3. p. 316. Weiske Rechtslexikon B. 3. p. 59. An exception exists in some cases where there is a want of interest. L. 38. § 17. de V. O. (45. 1.).

<sup>7</sup> L. 115. § 2. eod.

<sup>8</sup> L. 10. § 1. de pact. (2. 14.) L. 15. de transact. (2. 15.) L. 40. C. eod. (2. 4.). Unterholzner *loc. cit.* § 122.

event of any delay in the performance of the principal duty.<sup>c</sup> The penalty moreover may, in cases of doubt, be recovered, if the person obliged allows his duty to remain wholly or in part unperformed.<sup>d</sup>

*DIVISION III. RELATIONS OF RIGHTS AND DUTIES TO EACH OTHER.*

§ 82.

If rights and duties be considered in relation to each other, two questions will suggest themselves, viz. ; 1. what is the result of their meeting in one and the same person ? and 2. what is the result of the existence of several rights in different persons ? The first question leads to the doctrine of *Confusion*, the second to that of *Concurrence* and *Collision* of rights.

**I.—CONFUSION OF RIGHTS.**

§ 83.

With respect to confusion in general, i.e. the destruction of rights and duties by their meeting in one and the same person, the following distinctions are taken :

1. If *rights* and *duties* meet in one and the same person, of course there is nothing to prevent his having several rights and duties at one and the same time, only they cannot be against himself, and consequently if rights and their *correlative* duties meet in the same person each is extinguished by the other ; and if to a duty so destroyed other duties residing in other persons are accessory, such other duties are thereby also extinguished.<sup>e</sup>

2. If several *rights* meet in one and the same person each continues to exist unaffected by the others unless one abridges or limits another, in which case, inasmuch as no one can be bound to

<sup>c</sup> L. 115. § 2. de V. O. (45. 1.) L. 28. de act. emti (19. 1.). Unterholzner *loc. cit.* § 123. Not. 1.

<sup>d</sup> According to the rule : *particularis solutio pro nulla habetur*. Incorrect notions upon this subject are entertained by Glück Pand. 4. B. § 336. near the end, on account of cap. 9. X. de poenio (5. 37.). and by Pothier des obligations. ed. Hutteau p. 256—260. on account of L. 9. § 1. si quis caut. (2. 11.).

<sup>e</sup> L. 21. § 2. L. 11. pr. de fideiussor. (46. 1.) L. 75. L. 95. § 2. de solut. (46. 3.). W. A. Lauterbach de confusione. Tub. 1660. (Diss. V. 1. n. 56.).

himself, the limiting right ceases to have any independent existence and the limited right becomes unlimited.<sup>f</sup>

3. If several *duties* meet in one and the same person, each of them remains distinct;<sup>g</sup> but in case these duties are related to each other in the way of principal and accessory, the accessory duties are merged in the principal duty unless the former afford additional security for the performance of the latter.<sup>h</sup>

Moreover, rights extinguished by confusion revive when the cause of their junction, being temporary only in its nature, is destroyed;<sup>i</sup> or when the cause subsequently proves to have been insufficient.<sup>k</sup>

## II.—CONCURRENCE AND COLLISION OF RIGHTS.

### § 84.

If several rights are vested in several persons, the following cases may arise—

1. Each right may have a different object, in which case each right may evidently be fully exercised.

2. The several rights vested in several persons may have one and the same object, but no one of such rights may be of an exclusive nature (*Concurrence of rights*). In this case each right continues to exist, but he who exercises his right first can lessen the utility of the rights of the others.

3. The several rights vested in several persons may have one and the same object, and each of such rights may be exclusive in its nature (*Collision of rights*).<sup>l</sup> In this case again—

<sup>f</sup> L. 17. 27. quib. mod. usufr. am. (7. 4.) L. 1. quem. serv. am. (8. 6.).

<sup>g</sup> L. 13. de duob. reis (45. 2.) L. 93. pr. de solut. (46. 3.).

<sup>h</sup> L. 5. 14. 21. § 2. 4. de fideiussor. (46. 1.). Compared with L. 95. § 3. de solutt. (46. 3.). Wieling lect. iur. civ. L. 2. c. 12. Weber nat. Verb. § 128.

<sup>i</sup> L. 7. de fundo dotali (23. 5.). L. 27. § 11. D. ad SCTum Treb. (36. 1.). Donelli Comm. 7. 28. Lauterbach l. c. § 12. 13. 32.

<sup>k</sup> L. 21. § 2. de inoffic. test. (5. 2.) L. 87. § 1. de acquir. vel om. hered. (29. 2.) L. 22. C. de inoff. test. (3. 28.). Lauterbach § 23.

<sup>l</sup> See especially S. Stryk de iure privilegiati contra privilegiatum. Hal. 1702. & 1744. J. C. Koppe Nieders. Archiv 2. B. Nr. 34. Thibaut Versuche 2. B. Nr. 14. Hufeland Geist des Röm. R. 2. Thl. 2. Abth. 6—64. Fritz Erläuterungen. 1. Hft. 58—69. Kierulff Theorie B. 1. p. 230—240.

A. One of the conflicting rights may be founded upon some more general law than the others, in which case the right which is founded on the least general law is to prevail (a *privilegium* is to be preferred to a *jus singulare*, and the latter to a *jus commune*).<sup>m</sup>

B. The rights may be equally general. In this case—

a. If any one of the rights be favoured more than the rest that right must prevail. We are informed in several particular cases what rights are to be specially favoured,<sup>n</sup> and the general principle is also laid down that in cases of doubt the elder right is to be preferred to the younger;<sup>o</sup> but this principle is not as a general rule applicable to cases in which the collision arises simply from a multiplicity of merely personal creditors.<sup>p</sup>

b. If none of the rights are specially favoured, and if—

a. The collision is direct, that is if each person has the same right against the other, he is to be preferred who seeks to avoid a loss,<sup>q</sup> and if there is no difference in this respect then the right of him who is in possession of the object in dispute<sup>r</sup> is to prevail. If, however, none of the persons are in possession and each of them is in precisely the same situation as the other, none of the rights can, without some special decision of the sovereign, be exercised at all—(*privilegiatus contra æque privilegiatum jure suo non utitur*).<sup>s</sup> But—

β. If the collision is indirect, i.e. about some third object, and

<sup>m</sup> L. 80. de R. I. (50. 17.) L. 3. C. de silentar. et decur. (12. 16.).

<sup>n</sup> For example L. 11. § 7. de minor. (4. 4.) and Thib. Syst. § 808—810.

<sup>o</sup> L. 9. § 4. de public. (6. 2.) L. 26. locat. (19. 2.) L. 98. de R. I. (50. 17.) L. 8. C. qui pot. (8. 18.) cap. 22. X. de sponsal. (4. 1.).

<sup>p</sup> L. 32. de reb. auct. iud. poss. (42. 5.). See as to different cases of preference, I. F. Ludovici de duobus circa idem factum concurrentibus. Hal. 1714.

<sup>q</sup> L. 11. § 6. L. 34. pr. de minor. (4. 4.) L. 14. § 1. de religiosis. (11. 7.) L. 41. § 1. de R. I. (50. 17.) L. 22. § 5. C. de iure delib. (6. 30.). See *contra* Fritz Erläut. 1. Hft. 61—64.

<sup>r</sup> L. 91. § 3. de V. O. (45. 1.) L. 128. pr. de R. I. (50. 17.).

<sup>s</sup> Arg. L. 36. de dolo malo (4. 3.) L. 34. § 3. L. 57. de contr. emt. (18. 1.) L. 39. sol. matr. 24. 3. Hert de collis. leg. Sect. 5. See *contra* Fritz *loc. cit.* p. 64—67.



one of the persons be in possession of it, his right is to be preferred.<sup>c</sup> If, however, none of the persons are in possession the object must if possible be divided amongst them, or if this cannot be done the rights if founded on *privilegia* must be suspended, and none of them must be exercised without the approval of the sovereign.<sup>d</sup> In other cases where no principle whatever upon which to decide can be found, and no other resource remains, the preference must be decided by lot.<sup>e</sup>

#### DIVISION IV. OF THE MODIFICATIONS OF RIGHTS AND DUTIES.

##### § 85.

Rights and duties may be modified in various ways, and especially by the conditions and limitations of time to which they are subject and by the object which is to be attained. The legal principles which govern these matters are only to be found scattered amongst the law relating to contracts, institution of heirs, and legacies, and the same principle is not similarly applied in all these cases. Nevertheless, the doctrines which govern conditional contracts and the illustrations given of them, best accord with the nature of conditions in general, and supply the best materials for a general statement of the law of conditions, and consequently the following outline has been drawn up more with reference to contracts than to other transactions.

### I.—CONDITIONS.

#### 1. In general.

##### § 86.

A condition in a general sense means any event upon which rights and duties depend for their existence; but properly

<sup>c</sup> L. 9. § 4. de publiciana (6. 2.) L. 32. de procurat. (3. 3.) L. 15. C. de R. V. (3. 32.) L. 6. § 7. L. 24. quae in fraud. cred. (42. 8.).

<sup>d</sup> Arg. L. 42. 43. de hered. inst. (28. 5.).

<sup>e</sup> § 23. I. de legat. (2. 20.) L. 24. § 17. de fideic. lib. (40. 5.) L. 5. fam. here. (10. 2.) L. 3. pr. C. comm. de legat. (6. 43.) compared with L. 8. de pact. (2. 14.). Vinnii quaest. sel. L. 1. c. 35. Neundorff verm. Abh. Ulm 1805. Nr. 2. p. 17—49.

speaking those circumstances only which are uncertain, future, and unessential to the nature of the matter in hand and on the existence of which rights and duties can be made to depend are called conditions.<sup>7</sup> A past or present event on which a right is made to depend (the so-called *conditio in præteritum* and *præsens collata*), is no more properly speaking a condition,<sup>8</sup> than is the expression in a conditional form of that which is of itself naturally implied (*conditio tacita*).<sup>9</sup> Nevertheless, past and present events on which rights are made to depend are, save that they cause no postponement, similar in their effects to conditions proper;<sup>10</sup> and the so-called implied conditions have at least this effect, that their non-existence suspends the perfect acquisition of a right.<sup>11</sup>

## 2. Sorts of conditions.

### § 87.

**Negative, Affirmative; Precedent, Subsequent.**—Every condition, whether it consists of a positive or negative fact (*conditio affirmativa, negativa*), is suspensive, i.e. delays the perfect acquisition of a right so long as the condition remains unfulfilled. If the acquisition for the first time of a right is thus delayed the condition is called *precedent (suspensiva)*; but if the re-acquisition of a right is so delayed the condition is called *subsequent (resolutiva)*. A condition subsequent has no reference to the transaction by which the right is first transferred, but only to the

<sup>7</sup> § 11. I. de inutil. stip. (3. 19) L. 39. de reb. cred. (12. 1.) L. 9. § 1. de novat. (46. 2.). See generally F. Balduini comm. de conditt., as an appendix to his comm. de pignor. P. Brusselii tr. de conditt. bound with P. Durani tr. de condit. et modis imposs. Francf. et Lips. 1700. C. Ziegler Diss. de condition. (in his Discept. sel. Lips. 1721.). Weiske Rechtslexicon B. 1. p. 761. Savigny System B. 3. § 116—124. Sintenis Civilrecht B. 1. § 20.

<sup>8</sup> § 4. I. de verb. obl. (3. 15.) L. 39. de R. C. (12. 1.).

<sup>9</sup> L. 3. de leg. I. (30.) L. 99. L. 107. de cond. et demonstr. (35. 1.). L. 68. de iur. dot. (23. 3.) L. 12. de cond. inst. (28. 7.) L. 25. § 1. quando dies (36. 2.). Brussel l. c. L. 4. T. 1. Cocceii I. C. L. 2. T. 14. qu. 43.

<sup>10</sup> They are consequently also called conditions. L. 3. § 13. de bon. lib. (38. 2.) L. 10. § 1. de cond. inst. (28. 7.) L. 16. de iniusto rupto irritato (28. 3.) § 6. I. de Verb. obl. (3. 15.) L. 37. 38. 39. de R. C. (12. 1.) L. 100. 120. de V. O. (45. 1.).

<sup>11</sup> L. 4. § 2. de pact. (2. 14.) L. 1. pr. de cond. et dem. (35. 1.).

agreement by which the return of that right is stipulated,<sup>d</sup> and hence whatever effect a condition precedent has upon the first acquisition of a new right, the same effect is produced by a condition subsequent upon the re-acquisition of a right previously parted with.<sup>e</sup> In those cases in which suspension is not the ordinary effect of a transaction,<sup>f</sup> the presumption is in favour of a condition being subsequent rather than precedent.<sup>g</sup>

### § 88.

**Casualis, potestativa, mixta.**—Every condition, the performance of which requires a positive act and not a mere forbearance, is dependent on the effect of physical forces, and consequently (since the will can create nothing physical), every affirmative condition is casual (*casualis*). This term is, however, in strictness confined to those conditions which depend, solely, on the effect of something independent of the will. But the performance of a condition may depend—

1. On the will either wholly, without any assistance from nature, (as in cases of inaction) or at all events with such assistance only as nature ordinarily gives; or

2. On the will and some extraordinary assistance from nature.

In the first of these two cases the condition is termed *potestativa*, *promiscua*, and in the second *mixta*.<sup>h</sup> In the language of Roman law, the expression *conditio potestativa* is exclusively used

<sup>d</sup> L. 3. de contr. emt. (18. 1.) L. 1. de leg. comm. (18. 3.) L. 2. pr. de addict. in diem (18. 2.) Hence the former transaction is to be treated in every respect as unconditional. L. 2. § 4. 5. pro emt. (41. 4.) L. 2. pr. § 1. L. 4. § 3. de in diem addict. (18. 2.).

<sup>e</sup> L. 9. § 6. de R. C. (12. 1.) L. 8. C. de condict. ob. caus. dator. (4. 6.). Brussel L. 1. T. 1. n. 5. L. 5. T. 1. no. 1. Thibaut civ. Abh. 359—361. W. H. Jordens de conditione resolutive. Ludg. B. 1822. W. Sell über bedingte Traditionen. Zürich 1839.

<sup>f</sup> L. 1. § 2. pro dote (41. 9.) L. 7. in fin. L. 8. de iure dot. (23. 3.).

<sup>g</sup> L. 1. de lege comm. (18. 3.) L. 2. §. 4. pro emt. (41. 4.) Thibaut civ. Abh. 378—380. But a new destructive circumstance is of course not a condition subsequent; see Archiv f. civil. Prax. 5. B. Nr. 9.

<sup>h</sup> Generally speaking the laws only distinguish the *potestativa* (in the sense above) and the *non potestativa* L. 4. § 1. de hered. inst. (28. 5.) L. 78. § 1. de cond. et dem. (35. 1.) L. 31. § 2. ad ScT. Treb. (36.). The last can according

to denote a condition which renders the completion of a duty dependent on the will of the creditor. The term *conditio potestativa* is in modern times also used, but improperly, in those cases where the performance of a duty depends on the will of the debtor.<sup>i</sup>

### § 89.

**Possible, impossible.**—Conditions are either possible or impossible. They are impossible, if at the time of their annexation<sup>k</sup> their existence can, judging from general experience, be pronounced impossible, and they are possible if the contrary is the case. But impossibility is twofold, being the consequence either of physical laws, or of legal and moral precepts; in the former case the impossibility is termed physical (*physice impossibilis*), and so far as it betrays an intention to prejudice another *derisoria*;<sup>l</sup> in the latter case the impossibility is termed moral (*moraliter impossibilis, turpis*).<sup>m</sup> Either may be imagined to be negative or affirmative.<sup>n</sup> Conditions which are in themselves contradictory,<sup>o</sup> are treated as belonging to the impossible class.

## 3. Effect of conditions.

### § 90.

**In general.**—I. Every condition so long as it lasts (*pendet*) delays, if subsequent, the reacquisition; if precedent, the acquisition of a

to L. un. § 7. C. de caduc. (6. 51.) be divided into casual and mixed. The sense of the expression *promiscua* as used in L. 11. § 1. de cond. et dem. (35. 1.) is given properly by Merill obs. L. 14. c. 2., but improperly by A. E. Endemann de implendae conditionis tempore. Marb. 1821. p. 33—56. A. F. Schott de condit. potestativae figmento (in opusc.) wholly repudiates the *conditio potestativa*, but see C. G. Einert var. iur. civ. cap. Lips. 1773. cap. 2

<sup>i</sup> L. un. § 7. C. de caduc. (6. 51.). Gesterding Pfandrecht 19—36. It makes a promise void L. 17. L. 46. § 3. L. 108. § 1. de V. O. (45. 1.) L. 7. pr. de contr. emt. (18. 1.).

<sup>k</sup> L. 35. § 1. L. 137. § 6. de V. O. (45. 1.). Brussel. L. 1. T. 2. n. 12. 15.

<sup>l</sup> For example L. 14. de cond. inst. (28. 7.)

<sup>m</sup> L. 29. § 2. de testam. milit. (29. 1.) L. 20. de condit. et demonstr. (35. 1.).  
<sup>n</sup> § 11. I. de inutil. stipul. (3. 19.) L. 15. de cond. inst. (28. 7.) L. 123. L. 137. § 6. de V. O. (45. 1.). Averan. interpr. L. 2. c. 24.

<sup>o</sup> L. 16. de condit. instit. (28. 7.) L. 188. pr. de R. I. (50. 17.) L. 88. pr. ad leg. Falc. (35. 2.) L. 39. de manum. test. (49. 4.). Compare W. Sell on impossible conditions. Giessen 1834. p. 261—273. Schilling Institut. B. 2. § 81. Zuss. 4.

right:<sup>p</sup> so that he who by virtue of the condition will at some future time acquire a right cannot, even by possession, derive any of the legal advantages which are only consequent upon the existence of the unconditional right.<sup>q</sup>

The person obliged conditionally must, nevertheless, await the performance of the condition and not attempt to hinder it,<sup>r</sup> and the person entitled conditionally transmits his legal expectation to his heir if the latter can succeed to that to which the condition is annexed.<sup>s</sup>

II. If a condition has happened, which is the case if it be affirmative, as soon as the event has occurred, and if negative, as soon as the time for the event's happening has expired, or the event has become impossible,<sup>t</sup> the right becomes unconditional and effective; and in that case—

1. If the condition was subsequent, the thing must, according to its nature, be returned in the state it then is in. But in cases of contract it is especially declared that the thing is to be returned with all mesne profits, and unencumbered.<sup>u</sup> As a consequence of this the thing may be obtained by means of a *reindicatio* from a third possessor,<sup>v</sup>

<sup>p</sup> L. 66. de R. V. (6. 1.) L. 2. § 4. 5. pro emt. (41. 4.) § 4. I. de verb. obl. (3. 16.) L. 9. pr. de R. C. (12. 1.) L. 213. pr. de V. S. (50. 16).

<sup>q</sup> L. 4. pr. de in diem addict. (18. 2.) L. 8. pr. de peric. et comm. r. v. (18. 6.) L. 38. § 1. de A. v. A. P. (41. 2.).

<sup>r</sup> L. 57. L. 85. § 7. de V. O. (45. 1.) L. 5. C. de O. et A. (4. 10.). Therefore measures may here also be taken for safety. L. 41. de iudic. (5. 1.) L. 6. pr. quib. ex caus. (42. 4.) L. 4. pr. de separat. (42. 6.). G. P. v. Bülow Abh. 1. B. Nr. 17.

<sup>s</sup> § 4. I. de V. O. (3. 15.) § 25. I. de inutil. stipul. (3. 19.).

<sup>t</sup> § 4. I. de V. O. (3. 15.) L. 115. § 1. eod. (45. 1.). Höpfner Comm. § 740. Not. 6.

<sup>u</sup> L. 4. § 3. L. 6. pr. de in diem addict. (18. 2.). Wernher loc. c. L. 18. T. 2. § 8. W. Sell über bedingte Traditionen § 32—40.

<sup>v</sup> L. 41. pr. de R. V. (6. 1.) L. 4. § 3. de in diem addict. (18. 2.) L. 3. quib. mod. pign. solv. (20. 6.) L. ult. de leg. commiss. (18. 3.) L. 29. 30. de m. c. don. (39. 6.) L. 4. C. de pact. int. emt. et vend. (4. 54.). W. Sell loc. cit. § 33. Of an entirely different opinion is Riesser in Linde Zeitschr. 2. B. Nr. 1. & 8., and to some extent also Mühlenbruch Pand. B. 2. §. 267. Note 6. Thibaut retains the opinion expressed by him in his civilist. Abh. 367—378. Compare Thibaut in the Archiv f. civ. Prax. B. 16. Nr. 14. W. Müller civ. Abh. B. 1. Nr. 7. Fritz Erläut. 2. Hft. 254—268. Vangerow Leitfaden B. 1. § 96.

unless indeed the conditions depended solely on the will of the giver back.<sup>7</sup>

2. If the condition was precedent, the acquisition is made and completed, and, in general, as from the moment at which the condition happened. But here again in cases of contract the special principle is met with that, provided the thing is not wholly destroyed,<sup>8</sup> the happening of those conditions which do not depend solely on the will of the debtor<sup>9</sup> is to be considered as relating back to the time of their original annexation.<sup>b</sup> On the performance therefore of either sort of condition all mesne profits must be given up by the possessor.<sup>c</sup>

III. If the condition is never fulfilled (*deficit*) the right which was to arise or revert on its happening is postponed for ever and is to be deemed non-existing from the first.<sup>d</sup>

### § 91.

**Especially of such as are impossible.**—That which cannot physically exist is to be treated as having no existence, and that which ought not legally to exist can have no legal effect as existing, but only as not existing. Hence, with respect to impossible conditions ;<sup>e</sup>

1. Those which are affirmative, be they physically or morally impossible (§ 89), prevent the acquisition or reacquisition of the right which depends on them.<sup>f</sup>

<sup>7</sup> L. 3. in fin. quib. mod. pign. solv. (20. 6.).

<sup>8</sup> L. 8. pr. de peric. et comm. r. v. (18. 6.). Brussel L. 2. T. 1. n. 6.

<sup>9</sup> L. 4. quae res pignori (20. 3.) L. 9. § 1. L. 11. pr. §. 2. qui potior. (20. 4.).

<sup>b</sup> L. 8. pr. de peric. et comm. (18. 6.) L. 78. pr. de V. O. (45. 1.). W. Sell *loc. cit.* § 11—19.

<sup>c</sup> Stryk U. M. P. L. 18. T. 1. § 28. T. 6. § 5. Thibaut civil. Abh. 362—365. W. Sell *loc. cit.* § 15. See *contra* Cocceii I. C. L. 18. T. 2. qu. 3. & 12. Schweppe Röm. Priv. R. 1. B. § 119. Valett Pand. 1. B. § 109. But see L. 8. de peric. et c. r. v. (18. 6.) L. 11. qui pot. (20. 4.) L. 105. de condit. et dem. (35. 1.) L. 78. pr. de V. O. (45. 1.) L. 16. de solutt. (46. 3.). and especially with reference to produce, L. 4. § 3. L. 6. pr. de in diem addict. (18. 2.) L. 4. pr. § 1. de lege commiss. (18. 3.).

<sup>d</sup> L. 19. pr. de const. pec. (13. 5.) L. 20. de donat. int. V. et U. (24. 1.) L. 37. de contr. emt. (18. 1.).

<sup>e</sup> See Arndts Beiträge Hft. 1. Bonn 1837. Nr. 4.

<sup>f</sup> L. 7. L. 35. pr. L. 137. § 6. de V. O. (45. 1.) L. 9. § 6. de R. C. (12. 1.) L. 1. § 11. L. 31. de O. et A. (44. 7.) § 11. I. de inutil. stip. (3. 19.). Aweran.

2. Those which are negative and physically impossible are to be treated as already fulfilled;<sup>g</sup>

3. Those which are negative and morally impossible, by their very nature, delay the acquisition of a right until they happen, or are deemed to have happened according to the principles in § 90 (II); then acquisition follows. But with respect to contracts, according to the Roman law :

a. He who himself for reward undertakes (be it by way of condition precedent or subsequent) not to do that which is morally impossible, thereby renders void the whole agreement (for acquisition or reacquisition, as the case may be).

b. He, on the other hand, who stipulates for something from another, if he commits an unpermitted act, becomes on its commission entitled to what was promised.<sup>h</sup>

#### 4. Fulfilment of conditions.

##### § 92.

In order properly to understand this subject it is necessary further to observe that ;

1. Only that which is made the condition need be performed ; and this is not necessarily in every case expressed, but may either be ascertained by implication (*tacite*) from the nature of the transaction itself, or it may be presumed by law.<sup>i</sup>

2. Performance must be exact, that is, it must be—

a. At the time appointed, if any be named ; but still according to what is fair and reasonable.<sup>k</sup>

Int. L. 2. c. 24. n. 4. 5. Erlang. gel. Anz. v. 1752. Nr. 37. W. Sell unmögl. Beding. 31. 34. 37. 98—106. Savigny System B. 3. § 124.

<sup>g</sup> § 11. I. de inutil. stip. (3. 19.) L. 7. L. 8. de V. O. (45. 1.) Vangerow Leitfaden § 93. Anm. 2.

<sup>h</sup> The distinction must be drawn as in the text and not as is often done between conditions precedent and subsequent. L. 7. § 3. L. 50. de pact. (2. 14.) L. 121. pr. § 1. L. 123. de V. O. (45. 1.) L. 1. 2. C. si mancip. ita venier. (4. 56.). Thibaut civil. Abh. 362. Savigny System B. 3. § 122. W. Sell Versuche B. 2. 127—140. is of a somewhat different opinion.

<sup>i</sup> L. 77. pr. L. 102. de cond. et dem. (35. 1.) L. 4. § 2. de pact. (2. 14.) L. 7. in fin. L. 8. L. 21. L. 41. pr. § 1. L. 48. pr. de iure dot. (23. 3.). Struben 3. B. 58. Bed.

<sup>k</sup> L. 41. § 12. de fideic. libert. (40. 5.) L. 2. C. 11. § 1. de cond. et dem.

b. By the very person named, if performance by him and no one else was intended.<sup>1</sup>

c. In the manner required by the nature of the condition. Performance is not sufficient if it be of something else than, although of the same kind as, that intended; nor if it be to any other person than him named, if it was intended that performance should be to him and no other;<sup>m</sup> nor if it be of one act or some acts, where more, and those not in the alternative, are necessary.<sup>n</sup> An unfulfilled is to be regarded as a fulfilled condition only when he who would be benefited by its nonfulfilment has himself prevented its fulfilment.<sup>o</sup>

## II.—LIMITATIONS OF TIME OR DIES.

### § 93.

Rights and duties may also be modified as regards the time of their existence.<sup>p</sup> A right without any such modification is at once effective (*dies cedit*), and its correlative obligation can be immediately enforced (*dies venit*), subject, however, to equitable considerations.<sup>q</sup> If there be any such modification it may affect either the right itself or its prosecution. The time may moreover be certain or uncertain, as is the case if it is doubtful whether it will ever arrive at all, or when in particular it will arrive.

A right which is itself affected by a limitation of time, may be

(35. 1.) L. 135. § 2. de V. O. (45. 1.). A. E. Endemann de implendae cond. tempore. Marburg. 1821. p. 127—137.

<sup>1</sup> L. 39. § ult. de stat. liber. (40. 7.) L. 31. de solut. (46. 3.).

<sup>m</sup> L. 44. pr. § 1. 2. 3. de cond. et dem. (35. 1.) L. 11. § 11. de leg. III. (32.) L. 68. de solut. (46. 3.).

<sup>n</sup> § 11. I. de her. inst. (2. 14.).

<sup>o</sup> L. 50. L. 85. § 7. de V. O. (45. 1.) L. 39. L. 161. de R. I. (50. 17.) L. 24. de cond. et dem. (35. 1.) L. 50. de contr. emt. (18. 1.). Glück Pand. B. 4. § 337 d. Savigny System B. 3. § 119. A. and others go much further as they have deduced a general principle from the mild doctrines which govern testamentary dispositions, see Thib. Syst. § 954.

<sup>p</sup> Weiske Rechtslexikon B. 3. 423. Savigny System B. 3. § 125—127. Sintenis Civilrechts B. 1. § 21.

<sup>q</sup> L. 213. pr. de V. S. (50. 16.). Hert. de iurib. ex pacto certo temp. inclus. (in op. V. II. T. 3.).



so with respect either to its commencement (*ex die*<sup>r</sup> or *in diem*,<sup>s</sup> or in modern language *terminus a quo*) or to its duration (*ad diem*<sup>t</sup> or in modern language *terminus ad quem*). A right, the commencement of which is affected by a limitation of time which is certain (or only so far uncertain as distance renders it), is immediately vested although no action can be brought before the time arrives ;<sup>u</sup> but if the time be altogether uncertain then the right does not vest until the time arrives, or its arrival becomes certain.<sup>x</sup> A right, the duration of which is affected by a limitation of time, is vested immediately and before the arrival of the time ; but on its arrival the right may be successfully opposed by an *exceptio*.<sup>y</sup> If a contracting party makes the duration of a right, which must have some end, depend upon his own will the right ceases at his death.<sup>z</sup>

If any agreement is made touching the time of performance everything naturally depends upon the nature of the agreement. But it may be as well to mention here, that in cases of doubt the person obliged is at liberty to perform his obligation before the time appointed,<sup>b</sup> unless it can be shown that the stipulation as to time was made for the advantage of the other party.<sup>a</sup>

<sup>r</sup> L. 34. de her. inst. (28. 5.) L. 44. § 1. de O. et A. (44. 7.).

<sup>s</sup> § 2. I. de V. O. (3. 15.) § 2. I. de duob. (3. 16.) L. 16. pr. de her. pet. (5. 3.) L. 22. de O. et A. (44. 7.) L. 213. pr. de V. S. (50. 16). Brissonius de V. S. sub voce: in.

<sup>t</sup> L. 34. de her. inst. (28. 5.) L. 44. § 1. de O. et A. (44. 7.).

<sup>u</sup> § 2. I. de V. O. (3. 15.) L. 41. § 1. L. 45. § 3. L. 46. pr. eod. (45. 1.) L. 16. § 1. L. 17. de cond. ind. (12. 6.) L. 36. § 1. de cond. et dem. (35. 1.) L. 98. § 4. de solut. (46. 3.). Höpfner Comment. § 742. Note 2. Glück Pand. B. 4. § 335. Note 80.

<sup>x</sup> L. 49. § 2. 3. de legat. I. (30.) L. 56. de cond. ind. (12. 6.) L. 75. de cond. et dem. (35. 1.) L. 4. pr. L. 21. pr. L. 22. pr. quando dies (36. 2.). Aweran int. L. 2. c. 16.

<sup>y</sup> § 3. I. de V. O. (3. 15.) L. 4. pr. de servit. (8. 1.) L. 44. § 1. de O. et A. (44. 7.) L. 56. § 4. de V. O. (45. 1.) L. 52. § 3. de pactis. (2. 14.)

<sup>z</sup> L. 4. locat. (19. 2.)

<sup>a</sup> L. 3. § 3. de usur. (22. 1.) L. 43. § 2. de legat. II. (31.).

<sup>b</sup> L. 70. de solut. (46. 3.) L. 38. § 16. de leg. 2. (31.) L. 41. § 1. L. 137. § 2. de V. O. (45. 1.) L. 17. de R. I. (50. 17.). Maiana. comm. ad trig. Ictor. fragm. p. 262. Aweran. int. L. 2. c. 16. n. 18. Leyser Sp. 528. m. 14. Hommel Rhaps. obs. 393. Müller ad Leyser obs. 881.

## 1. Computation of time.

## § 94.

The legal mode of computing time is of great importance with reference to the doctrines now under examination.<sup>c</sup>

A day consists of twenty-four successive hours.<sup>d</sup> If these are reckoned, as they in general must be,<sup>e</sup> from midnight to midnight (*a septima hora ad septimam horam noctis*), the day is called a *calendar* day; if any other hour is taken from which to reckon, the day is called a *moveable* or *natural* day (*dies naturalis*), an expression however which like the unqualified word *day* is often taken to mean only the period of daylight.<sup>f</sup>

A month consists, as a rule, of thirty days,<sup>g</sup> and can in a similar manner, at least in those cases in which the month does, according to the calendar, consist of thirty days, be called a *calendar* or a *natural* month.

A year consists, as a rule, of 365 successive days,<sup>h</sup> and similar expressions are applied to it. An additional day (*dies intercalaris*) is added to Leap-year, from which other years are distinguished by the term *common*. This additional day is the 24th of

<sup>c</sup> Compare generally I. T. Seger de anno *Romano*. Lips. 1759. (op. ed. Klüber V. 1. n. 1.). Eustathii liber de temporum intervallis edited by E. Zachariä. Heidelberg 1836. Koch Belehrungen über die Mündigkeit zum Testiren. Giess. 1796. Heimbach in Weiske Rechtslexikon B. 2. 523—544. Savigny System B. 4. § 179—195.

<sup>d</sup> L. 8. de fer. et dilat. (2. 12.).

<sup>e</sup> Schweppe Magaz. 1. St. 116—138. F. Reinfelder der annus civilis des R. R. Stuttg. 1829. 20—31.

<sup>f</sup> L. 2. § 1. de V. S. (50. 16.). Emminghaus ad Cocceii I. 2. Tit. 12. qu. 1.

<sup>g</sup> L. 11. § 6. L. 29. § 5. ad leg. Iul. de adult. (48. 5.) L. 28. L. 31. § 22. L. 38. pr. de aed. ed. (21. 1.) L. 22. § 2. § 11. C. de iure delib. (6. 30.) Nov. 115. cap. 2. When the laws speak of several months an additional day is to be added. Schweppe Privatrecht B. 1. § 57 c. But there are special cases in which the reckoning is not always exactly by months. L. 101. de R. I. (50. 17.) L. 12. de statu hom. (1. 5.) L. 3. § 12. de suis (38. 16.) L. 2. L. 5. pr. C. de tempor. (7. 63.) Nov. 115. c. 2. K. G. O. v. 1555. 2. Th. Tit. 30. § 4. Compare E. Schrader civilist. Abh. 2. Abth. 193—220. Fritz Erläuterungen 1. Hft. 234. 235. Reinfelder *loc. cit.* 116—178. Savigny System B. 4. § 181. 185. B.

<sup>h</sup> L. 134. de V. S. (50. 16.).

February<sup>i</sup> (*dies posterior*), and is reckoned along with the next, the 25th of February (*dies prior*), as one day (*dies bissextus*), except in those cases in which, by the express terms of a contract,<sup>k</sup> a period of time is limited by an exact number of days.<sup>l</sup>

It cannot be shown that the German juridical month is changed,<sup>m</sup> or that the 29th of February must be considered the extra day,<sup>n</sup> or that the expression year and a day means in cases of doubt more than a year and twenty-four hours.<sup>o</sup>

### § 95.

If a period of time be reckoned in the ordinary way<sup>p</sup> it is taken to begin with the moment named (*tempus continuum ratione initii*) to include every succeeding moment of its course (*tempus continuum ratione cursus*), and to end on the expiration of its very last moment.<sup>q</sup>

There are, nevertheless, certain cases, from which clearly no general rule can be deduced,<sup>r</sup> in which the laws have sanctioned a peculiar mode of reckoning, and this remark is more especially applicable to the computation of time in the prætorian actions.<sup>s</sup>

1. It is laid down that in many cases<sup>t</sup> as against a person pro-

<sup>i</sup> Savigny System B. 4. § 192—194.

<sup>k</sup> Savigny *loc. cit.* § 193.

<sup>l</sup> L. 98. eod. L. 4. § 3. de minor. (4. 4.) L. 2. de divers. temp. præsc. (44. 3.). The last passage must however be read: *sed si quis fundum — proficiet emptori. cap. 14. § 1. X. de V. S. (5. 40.).* Bynkershoek Obs. L. 4. c. 8. See too Koch *loc. cit.* 12. C. H. Fetzer Versuche zur Bild. des R. R. Heilbr. 1802. 1—30. H. W. Schultes Bemerk. über die Mündigkeit zum Testiren nach Röm. R. Jen. 1800. Unterholzner Berjährungslehre 1. B. 279—312.

<sup>m</sup> Struben 1. B. 47. Bed. Reinfelder *loc. cit.*

<sup>n</sup> cap. 14. X. de V. S. (5. 40.) Koch *loc. cit.* § 9. & his Bestät. der Belehrungen 32—36. See *contra* I. M. Schneidt de usu studii chronologici etc. Wirceb. 1782. and his Schlusssatz oder letztes Wort &c. Wirzb. 1798.

<sup>o</sup> Glück Pand. B. 3. § 269.

<sup>p</sup> See generally Gmelin jurid. Archiv. 2. Bd. 2. H. Unterholzner *loc. cit.* 282—288. Savigny System § 189—191. Elvers Themis. New Series B. 1. Götting. 1838. p. 127. *contra* Arndts in Linde Zeitschrift B. 14. Nr. 1.

<sup>q</sup> For example L. 8. de his qui not. inf. (3. 2.) L. 31. § 1. de usurp. (41. 3.).

<sup>r</sup> Writers are not however here unanimous. Fritz *loc. cit.* 235. Savigny *loc. cit.* § 189.

<sup>s</sup> Glück Pand. B. 3. § 269 a.

<sup>t</sup> Savigny *loc. cit.* § 189. Nr. 1—3. § 191.

secuting his right, those days are not to be counted on which he by any means <sup>u</sup> (including therefore his own excusable ignorance) has been prevented from so doing.\* Such a time is called *tempus utile*,<sup>v</sup> and is commonly said to be of three kinds, according as the commencement of the period is postponed,<sup>z</sup> or certain days in its course are not reckoned,<sup>a</sup> or both happen together;<sup>b</sup> and those kinds are respectively described as *tempus utile ratione initii et continuum ratione cursus*—*tempus continuum ratione initii et utile ratione cursus*—*tempus utile ratione initii et cursus*. The last kind is, in the absence of all reason to the contrary, always that intended by the simple expression *tempus utile*.<sup>d</sup>

2. There are again other cases in which the mode of reckoning (*computatio civilis*) is so anomalous that as soon as the last day<sup>f</sup> or year<sup>g</sup> of a period of time is reached,<sup>e</sup> it is considered as already ended.<sup>h</sup>

\* See *contra* Savigny *loc. cit.* § 189. Nr. 4. § 190.

<sup>u</sup> L. 1. § 1. ex quib. causis. maior. (4. 6.) L. 1. de divers. temp. praeser. (44. 3.) L. 1. § 7—9. quando appell. sit. (49. 4.) L. 6. de calumn. (3. 6.) L. 1. § 1. L. 9. § 1. de iur. et fact. ignor. (22. 6.) L. 2. quis ordo in poss. (38. 15.) cap. 10. H. de praeser. (2. 26.).

<sup>v</sup> Arndts in Linde Zeitschrift B. 14. Nr. 1.

<sup>z</sup> For example § 16. I. de excus. (1. 25.) L. 19. C. de iure delib. (6. 30.) Nov. 23. cap. 1.

<sup>a</sup> See note c.

<sup>b</sup> For example L. 10. de bon. poss. (37. 1.) L. 2. pr. quis ordo in poss. (38. 15.).

<sup>c</sup> A temp. cont. rat. initii et utile ratione cursus is nowhere to be met with in the laws and it is incorrect to cite as examples of it L. 19. § ult. L. 20. 55. de aedil. edict. (21. 1.) L. 2. C. de aedil. act. (4. 58.). Fritz *loc. cit.* 235. 236. See *contra* Haubold de temporis continui et utilis computatione (opusc. T. I.) cap. 6.

<sup>d</sup> Glück Pand. B. 3. § 269 a. Note 46.

<sup>e</sup> Sometimes only if completed L. 6. de O. et A. (44. 7.) L. 30. § 1. ad leg. Iul. de adult. (48. 5.) L. 1. § 9. de succ. ed. (38. 9.). Savigny System B. 4. § 185. 186. The period of infancy is reckoned a momento ad momentum. L. 3. § 3. de minor. (4. 4.). Puchta Cursus der Instit. B. 2. 311. 312. But compare Vangerow Leitfaden B. 1. § 196.

<sup>f</sup> L. 5. qui test. fac. (28. 1.) L. 1. de manumiss. (40. 1.) L. 6. 7. de usurp. (41. 3.) L. 15. de divers. temp. praeser. (44. 3.) L. 132. pr. L. 134. de V. S. (50. 16.).

<sup>g</sup> Savigny *loc. cit.* § 182. Not. f. and Bachofen in Linde Zeitschrift B. 18. Nr. 2. & 11. consider the passages cited for this view L. 74. § 1. ad Scutum Treb. (36. 1.) & L. 8. de muner. (50. 4.) to be interpretations of a *lex*.

<sup>h</sup> The views and principles of explanation adopted by interpreters are

## 2. Of Delay.

### § 96.

If a time is expressed for the performance of a duty, that time must of course be observed; the judge may, however, on equitable grounds reasonably postpone the commencement of a period of time if unfixed, but the mere fact that such commencement happens to fall on a day of rest does not of itself prevent the period from beginning on that day.<sup>1</sup>

If in consequence of gross<sup>k</sup> neglect<sup>l</sup> a duty is not performed by the day appointed there is what is called delay<sup>m</sup> (*mora*). Delay may arise either from the fault of the debtor (*mora præstandi vel solvendi*) if he does not pay a liquidated debt<sup>n</sup> at the appointed time, or from the fault of the creditor (*mora accipiendi*) if he will

very various. Compare I. C. Rücker de civil. et nat. temp. comp. in his obs. et int. Gmelin Archiv. 2. B. 4. Hft. Löhr im Archiv f. civ. Prax. 11. B. Nr. 18. Reinfelder *loc. cit. passim*. Erb in Hugo civil. Mag. B. 5. Nr. 8. Unterholzner Verjährungslehre B. 1. § 90. Savigny System B. 4. § 182—191.

<sup>1</sup> L. 31. de re indic. (42. 1.). Schöman Handb. 2. B. 332—334. L. 137. § 2. de V. O. (45. 1.).

<sup>k</sup> L. 1. § 22. depositi (16. 3.) L. 91. § 3. de V. O. (45. 1.). Wolff *Mora* 255—263.

<sup>l</sup> L. 23. § 1. de recept. (4. 8.) L. 5. de R. C. (12. 1.) L. 37. mand. (17. 1.) L. 12. § ult. L. 14. § 1. depos. (16. 3.) L. 21. § 3. L. 51. de act. E. V. (19. 1.) L. 21—24. 32. pr. L. 47. de usur. (22. 1.) L. 63. de R. I. (50. 17.). On account of L. 137. § 4. de V. O. (45. 1.), which does not however relate to *mora* but to the commencement of the duty, Schöman Handb. 2. B. p. 291—306. is of a different opinion. See on the other hand H. Ratjen de *mora*. Kil. 1824. p. 7—9. H. Lotz de *morae initio*. Wircsb. 1825. p. 20—38. W. Klee de eod. arg. Hal. 1829.

<sup>m</sup> See generally A. Ferretus de *mora et interesse*. Lugd. 1564. Osnbr. 1675. H. de Cocceii de *mora*. Heidelb. 1680. (Exerc. T. 1. n. 59.) C. F. G. Meister D. *morae* notion. iuridicam sistens (opusc. T. 1.). C. G. Wehrn doctr. iur. explicatr. princ. et caus. damni etc. Lips. 1795. p. 292—346. C. O. v. Madai die Lehre v. d. *Mora*. Halle 1837. and on it F. A. Schilling in Richter Krit. Jahrb. 1838. 218—288. Fritz Erläut. Hft. 3. 325—371. Unterholzner Schuldverhältnisse B. 1. 107—131. C. W. Wolff zur Lehre v. d. *Mora*. Gött. 1841.

<sup>n</sup> If the debt be not liquidated the doctrines relating to *mora* do not apply. L. 3. pr. de usur. (22. 1.) L. 89. § 1. ad L. Falc. (35. 2.) L. 88. de R. I. (50. 17.). Archiv für civil. Prax. 9. B. Nr. 6.

not accept the thing at the time appointed<sup>o</sup> or avoids a necessary liquidation.<sup>p</sup>

§ 97.

**Consequences of Delay.**—The consequences of delay are partly general,<sup>q</sup> partly special.

I. Its general consequences are that—

1. The duty is continued, i.e. the risk of the thing is with the delaying party.<sup>r</sup> This rule would from some laws appear to be unexceptional,<sup>s</sup> but must in fact be received with the qualification,<sup>t</sup> that a delaying party, not excepting a thief or violent possessor,<sup>u</sup> is not answerable for damage if he can prove<sup>v</sup> that it would have accrued just the same if the thing had been duly given up.<sup>x</sup>

2. Anything made payable in case of delay becomes forfeited.<sup>y</sup>

II. Its special consequences are:

1. If the delay arises on the part of the person obliged, that—

<sup>o</sup> L. 37. *mandati* (17. 1.) L. 72. *pr. de solut.* (46. 3.).

<sup>p</sup> L. ult. C. de *usur. pupillar.* (5. 56.). Madai *loc. cit.* 264 interprets this passage differently.

<sup>q</sup> See *contra* Madai *ubi supra* § 43.

<sup>r</sup> L. 24. § 2. de *usur.* (22. 1.) L. 91. § 3. 4. de V. O. (45. 1.) Madai *loc. cit.* § 44.

<sup>s</sup> L. 5. *pr. de reb. cred.* (12. 1.) L. 5. § ult. de *in lit. iur.* (12. 3.) L. 20. de *cond. furt.* (13. 1.) L. 23. de *const. pec.* (13. 5.) L. 25. § 2. *sol. matr.* (24. 3.) L. 39. § 1. L. 108. § 11. de *legat. I.* (30.) L. 23. L. 82. § 1. de V. O. (45. 1.) L. 58. § 1. de *fideiuss.* (46. 1.) L. 31. *pr. de novat.* (46. 2.) L. 3. C. de *usur. et fruct.* (6. 47.). Wolff *loc. cit.* § 40. Note 354.

<sup>t</sup> See against this limitation Madai *loc. cit.* § 46. *contra* Rosshirt *Zeitschrift* B. 3. 20—22.

<sup>u</sup> L. 14. § 11. *quod m. c.* (4. 2.) L. 30. § 1. de *iureiur.* (12. 2.) L. 1. § 34. L. 19. de *vi* (43. 16.). See *contra* on account of L. 8. § 1. L. ult. de *cond. furtiv.* (13. 1.) L. 9. C. de *furt.* (6. 2.). Wehrn l. c. p. 318. not. 21. A. G. Krug de *condictione furtiva*. Lips. 1830. p. 1—30. Vangerow *Leitfaden* B. 3. § 333.

<sup>v</sup> L. 14. § 11. *cit.* L. 15. § 3. de R. V. (6. 1.) L. 12. § 4. ad *exhib.* (10. 4.) L. 47. § 6. de *legat. I.* (30.) L. 14. § 1. *deposit.* (16. 3.) L. 45. de O. et A. (44. 7.). See for the different views G. Prousteau *recit.* ad L. 23. de R. I. cap. 27. § 23—39. Meerman Th. T. 3. Emminghaus ad Cocceii L. 5. T. 3. qu. 19. Schöman *Handb.* 2. B. 335—342. Vangerow *Leitfaden* B. 3. § 589. Anm. 3.

<sup>x</sup> Prousteau l. c. § 28. Wolff *loc. cit.* 467. The other side must, to rebut this, prove that he would immediately have sold the thing. L. 15. § 3. de *rei vind.* (6. 1.) L. 47. § 6. de *legat. I.* (30.).

<sup>y</sup> L. 40. de R. C. (12. 1.).

A. He must pay interest,<sup>a</sup> at least *in bonæ fidei iudiciis*,<sup>b</sup> and also account for mesne profits,<sup>c</sup> and pay damages;<sup>d</sup> but these accessories unless there be fraud<sup>e</sup> cannot be obtained by any special action after the action for the principal thing is gone.<sup>f</sup>

B. The person entitled need not, so long as the delay continues, perform any duty, the performance of which depends upon performance by the other side;<sup>g</sup>

C. The delaying party is answerable for any detriment however small;<sup>h</sup>

D. The person entitled, obtains, in cases of alternative duties, the right (which he would otherwise not have) of determining, not indeed generally with respect to,<sup>i</sup> but the place for performance;<sup>k</sup>

E. He can entirely abandon a contract which by reason of the delay has become useless to him;<sup>l</sup>

F. The value of the thing which the person delaying ought to

<sup>a</sup> L. 10. § mandati (17. 1.) L. 60. pr. pro socio (17. 2.) L. 17. § 3. 4. L. 32. § 2. de usur. (22. 1.) L. 87. § 1. de legat. II. (31.) L. 2. C. depositi (4. 34.).

<sup>b</sup> Rosshirt *loc. cit.* 17—33. Also according to a decision of the supreme court 1600 § 139 in cases of a money loan.

<sup>c</sup> L. 17. § 1. de R. V. (6. 1.) L. 3. pr. L. 38. § 1. 6. 14. de usur. (22. 1.) L. 23. de legat. I. (30.) L. 18. pr. ad SCTum Treb. (36. 1.), even those percipiendi. Unterholzner Schuldverhältnisse § 58. Note t. Wolff *loc. cit.* § 38. But see *contra* Madai *loc. cit.* § 51.

<sup>d</sup> L. 21. § 3. de act. emti (19. 1.) L. 8. L. 14. pr. L. 39. de usur. (22. 1.) L. 26. de legat. III. (32.) L. 44. § 1. ad. SCTum Treb. (36. 1.) L. 1. § 13. ut legat. (36. 3.). Madai *loc. cit.* § 54.

<sup>e</sup> L. 61. § 3. de furt. (47. 2.) L. 78. de R. I. (50. 17.). Gluck Pand. B. 4. § 331. Madai *loc. cit.* pref. p. xv.

<sup>f</sup> L. 129. § 1. L. 178. de R. I. (50. 17.) L. 26. pr. C. de usur. (4. 32.) L. 4. C. depos. (4. 34.)

<sup>g</sup> This is only a consequence of the *exceptio non adimpleti contractus* (see Thib. Syst. § 401.). Madai *loc. cit.* 390. Unterholzner Schuldverhältnisse B. 1. § 58.

<sup>h</sup> L. 8. § 6. de precario (43. 26.) L. 14. § 11. de furt. (47. 2.).

<sup>i</sup> L. 106. L. 138 § 1. de V. O. (45. 1.) § 33. I. de action. (4. 6.) Kurrer de obligat. alternativa. Tubing. 1686. cap. 6. n. 83. See Wehrn l. c. § 48. n. III. and Glück Pand. B. 4. § 330. Archiv für civilist. Praxis. 1. B. 325—328. who express themselves generally. The whole position is denied by Madai *loc. cit.* 396—402.

<sup>k</sup> L. 2. § 3. 4. de eo quod certo (13. 14.) See below § 584.

<sup>l</sup> L. 135. § 2. de V. O. (45. 1.). Madai *loc. cit.* 391—396. thinks differently on account of L. 6. C. de pact. int. emt. et vend. (4. 54.).

give up to the other on request is increased.<sup>m</sup> By this is meant that—

a. If the thing is wholly lost it is to be considered as having been of the greatest value it ever had between the commencement of the delay and the loss ;<sup>n</sup> but—

b. If it be not lost the value is to be considered as great as it ever was between the commencement of the delay and the giving of judgment, or between the commencement of the delay and the delivery of the thing, according as the transaction is *bonæ fidei* or *stricti juris*.<sup>o</sup> If, however, a day be named for delivery, the value is to be estimated at what it would have been on that day.<sup>p</sup> Regard is to be had to the same periods of time when the evidence adduced is the oath of the person injured.<sup>q</sup>

2. If the delay arises on the part of the person entitled, then—

A. The party obliged is released from all the before mentioned consequences arising from delay on his part ;<sup>r</sup>

B. The person obliged is answerable only for gross negligence,<sup>s</sup> and has not to make compensation for any detriment not resulting therefrom ;<sup>t</sup>

<sup>m</sup> L. 21. § 3. de act. E. V. (19. 1.). Compare generally Huber prael. ad P. L. 13. T. 3. § 5—10. and for the many different views based on L. 29. rer. amot. (25. 2.) L. 50. pr. de furtis (47. 2.) L. 59. de V. O. (45. 1.) see Voet eod. Tit. § 3. Leyser Sp. 150. m. 3. Wehrn l. c. § 70—73. Winkler Diss. de lit. cont. Sect. 2. § 7. Sect. 3. § 7. Pufendorf T. 2. Obs. 41. § 14. Glück Pand. 4 Bd. 418. Note 64. 13. B. 271—300. Gans Obligationenrecht. 58—70. Buchholtz jurist. Abhandl. 382—385. Madai *loc. cit.* § 48. Unterholzner *loc. cit.* § 131. V. For the Saxon doctrine see Gottschalk Disc. for. c. 14.

<sup>n</sup> L. 3. de cond. tritic. (13. 3.).

<sup>o</sup> L. 3. 4. eod. L. 8. § 1. de cond. furt. (13. 1.) L. 3. § 3. de act. E. V. (19. 1.).

<sup>p</sup> L. 22. de R. C. (12. 1.) L. 4. de cond. tritic. (13. 3.).

<sup>q</sup> C. v. Eek de septem LL. damn. Pand. c. 1. § 3. (in Meerman Th. Supplem.). See *contra* Faber Err. Pr. P. 1. Dec. 17. Er. 6. But see Schröter in Linde Zeitschr. B. 7. Nr. 11.

<sup>r</sup> L. 122. § 3. de V. O. (45. 1.) L. 72. pr. de solut. (46. 3.) L. 23. § ult. L. 24. de recept. (4. 8.). Compare Madai *loc. cit.* § 64.

<sup>s</sup> L. 5. pr. L. 17. de perie. et comm. r. v. (18. 6.) L. 9. solut. matrim. (24. 3.).

<sup>t</sup> L. 105. de V. O. (45. 1.) L. 72. pr. de solut. (46. 3.). Madai *loc. cit.* § 63.



C. In cases of bilateral transactions, a defence of contract unperformed, if set up by the person obliged, cannot be successfully replied to;<sup>u</sup> and

D. If the person entitled claims the value of a thing, he can only obtain its least value.<sup>x</sup>

### § 98.

**Curing of Delay.**—The consequences of delay, with the exception of the liability to make good damage which may have accrued, cease (*mora purgatur*)—

1. When the delaying person performs his duty; or, in case no time for performance be fixed,<sup>y</sup> expresses himself ready to perform it before the non-performance has been made the ground of an action:<sup>z</sup>

2. When the duty itself is otherwise extinguished;<sup>a</sup> or

3. When valid legal reasons can be assigned for its non-performance.<sup>b</sup>

4. If both the person obliged and the person entitled are guilty of delay at the same time, the fault of the one cures that of the other, and if at different times, the later cures the earlier delay.<sup>c</sup>

<sup>u</sup> L. 9. § 5. de pign. act. (13. 7.) L. 23. 25. de act. e. v. (19. 1.) L. 11. C. de usur. (4. 32.). See above note *g* and Madai *loc. cit.* 465, 466.

<sup>x</sup> L. 3. § ult. de act. E. V. (19. 1.). Wehrn l. c. § 48. Wolff *loc. cit.* 495. See *contra* Madai *loc. cit.* 460.

<sup>y</sup> In this case according to § 99 the rule, *dies interpellat pro homine*, is applicable, and where this is the case there is no *purgatio moræ*; but even here a time unimportant to the person entitled is not prejudicial. L. 135. § 2. de V. O. (45. 1.) cap. 4. X. de locato (3. 18.). Cuiac. opp. T. 1. p. 1410. 1411. T. 5. p. 855. T. 9. p. 1266. *Contra* Madai *ubi supra* 495.

<sup>a</sup> L. 73. § ult. L. 84. L. 91. § 3. L. 135. § 2. de V. O. (45. 1.) L. 17. de const. pec. (13. 5.) L. 72. pr. de solut. (46. 3.) L. 23. pr. de recept. (4. 8.). Schöman Handb. 2. B. 311—315. Wernher lectiss. comment. L. 18. T. 3. § 6.

<sup>b</sup> L. 17. de cond. furt. (13. 1.) L. 29. § 1. de V. O. (45. 1.) L. 8. pr. de novat. (46. 2.). Glück Pand. 4. B. § 330. Madai *loc. cit.* § 66. Wolff § 46.

<sup>c</sup> Arg. L. 40. de R. C. (12. 1.) L. 21. 22. 23. de usur. (22. 1.).

<sup>e</sup> L. 23. § 1. de recept. (4. 8.) L. 26. L. 39. solut. matr. (24. 3.) L. 51. pr. de act. E. V. (19. 1.) L. 17. de peric. et comm. r. v. (18. 6.). Wehrn l. c. p. 330—32. Fritz im Arch. f. civ. Prax. 10. B. Nr. 6. See against the doctrine of simultaneous delay Madai *loc. cit.* § 70.

§ 99.

**Commencement of delay.**—The before mentioned consequences of delay ensue, even if a right is conditional and the condition goes to performance,<sup>d</sup> only after the person obliged, or him through whom he claims<sup>e</sup> has been requested to perform his duty (*mora ex persona*);<sup>f</sup> but if a day certain be fixed for performance either by agreement or by law, delay (*mora ex re, in re, in rem*) commences and its consequences ensue without any request being previously necessary.<sup>g</sup>

With respect to delay where the time is fixed by law, two rules are generally laid down; viz. (1) that in the case of a fraudulent taking, delay begins immediately *eo ipso*, whilst (2) in case of bilateral transactions it begins as against the delaying party directly after performance by the other.<sup>h</sup>

In order to render the person obliged liable for his delay, nothing more than a warning or notice, which need not be judicial, is required;<sup>i</sup> but in order that a person obliged may be freed from the consequences of his delay, or in order that a person entitled may be prejudiced by delay on his part, the person obliged must make, to the person entitled, or to his agent duly authorised to

<sup>d</sup> Glück Pand. B. 4. § 329. Note 15. Höpfner Comm. 755. Note 2.

<sup>e</sup> L. 20. § 11. de her. pet. (5. 3.) L. 32. § 1. de usur. (22. 1.) L. 24. L. 49. § 2. de V. O. (45. 1.).

<sup>f</sup> L. 32. pr. de usur. (22. 1.) L. 36. § 3. de legat. 1. (30.) L. 5. § 20. ut in poss. (36. 4.) L. 23. de V. O. (45. 1.).

<sup>g</sup> L. 5. de R. C. (12. 1.) L. 4. § 4. de lege comm. (18. 3.) L. 135. § 2. de V. O. (45. 1.) L. 10. C. de act. emt. (4. 49.) L. 12. C. de contr. stip. (8. 38.) cap. 4. X. de locat. (3. 18.). See, upon this much contested point, Neustetel im Arch. f. civ. Pr. 5. B. Nr. 8. Schröter in Linde Zeitschr. B. 4. Nr. 5. B. 7. Nr. 3. Unterholzner Schuldverhältnisse § 99. Wolff *loc. cit.* § 27—29. *Contra* Thibaut's essays in Arch. f. civ. Pr. B. 6. Nr. 2. B. 16. Nr. 7. Madai *loc. cit.* § 16—24. Vangerow Leitfaden § 588. Anm. 2.

<sup>h</sup> The first rule is deduced from L. 8. § 1. L. 20. de condict. furt. (13. 1.) L. 1. § 34. 35. L. 19. de vi (43. 16.) L. 7. C. de cond. ob turp. (4. 7.); and the second from L. 13. § 20. 21. L. 47. in f. de act. e. v. (19. 1.) L. 5. C. cod. (1. 49.) L. 5. § 1. 2. de praeser. verb. (19. 5.). The duty to pay interest arises here from the enjoyment of the thing received. Ratjen l. c. p. 18—20. Schöman Fragm. 43—45.

<sup>i</sup> For this is not a case of self-redress. Wehrn l. c. p. 304. not. 20. But see Madihn princ. iur. R. T. 1. § 125. ed. III.

accept performance,<sup>k</sup> a proper offer to perform the obligation which he is under.<sup>l</sup> But still a *real* tender, which in the case of immoveables cannot possibly be made, is even for this purpose only required of the person obliged, when by the very nature of his duty he is bound to carry the thing to the person entitled.<sup>m</sup> The formalities of sealing and depositing in court are by no means requisite in order that the person entitled may be placed *in mora*,<sup>n</sup> and it is just as incorrect to require them as it is to suppose that an offer can hinder the continuance of liabilities not arising from delay, or to deny that the continuance of liabilities arising from it is thereby stopped.<sup>o</sup> Where an act has to be done, a mere offer if unaccepted frees the party bound from the whole performance.<sup>p</sup>

### III.—MODUS.

#### § 100.

*Modus* is where certain affirmative or negative duties are imposed upon the receiver of a thing, and regulate its user.<sup>q</sup> From the nature of *modus* it follows that the transaction to which

<sup>k</sup> L. 11. 12. de pact. (2. 14.) L. 34. § 3. de solut. (46. 3.). In such a case or in the case of a general empowerment, it is not necessary that the principal should have notice to be affected with *mora*, as is supposed by Pufendorf T. 3. Obs. 168. Compare Madai *loc. cit.* § 40.

<sup>l</sup> L. 9. § ult. de pign. act. (13. 7.) L. 73. § ult. L. 122. pr. de V. O. (45. 1.) L. 39. L. 72. pr. de solut. (46. 3.) L. 6. C. de usur. (4. 32.) Nov. 91. c. 2. Madai *loc. cit.* § 5—7.

<sup>m</sup> There is much dispute as to this. Lotz l. c. p. 63—81. Madai *loc. cit.* § 37. Wolff *loc. cit.* § 33.

<sup>n</sup> L. 72. pr. de solut. (46. 3.) L. 17. de peric. (18. 6.) L. 11. C. de usur. (4. 32.). Voet L. 46. T. 3. n. 28. 29. Wehrn p. 298. Madai *loc. cit.* § 41. Wolff *loc. cit.* § 34.

<sup>o</sup> L. 9. L. 19. C. de usur. (4. 32.) compared with L. ult. C. de usur. pupillar. (5. 56.) L. 28. § 1. de administr. tutor. (26. 7.) This opinion is half-way between that of Hellfeld D. de oblatione debiti usurar. init. non vero ear. curs. impediende. Ien. 1778. and of Wehrn l. c. p. 301. 344. 45. Madai. *loc. cit.* § 69.

<sup>p</sup> L. 39. de R. I. (50. 17.) and on it Wolff *loc. cit.* § 43.

<sup>q</sup> L. 4. § 1. de servit. (8. 1.) L. 41. pr. de contr. emt. (18. 1.) L. 58. § 2. locat. (19. 2.) L. 17. § 4. de cond. et dem. (35. 1.). The meaning of *modus* is understood in different ways: C. F. G. Meister de eo quod inter condit. resol. et modum interest (in opusc. T. II.). C. C. Schnauss de effect. et nat. modi in

it is annexed is, in the absence of any special condition giving rise to a *modus mixtus*, of itself unconditional,<sup>r</sup> and that there arises an unconditional accessory duty, for the performance of which, however, no security can be demanded in the case of contracts.<sup>s</sup>

If the *modus* is possible it must be observed,<sup>t</sup> except when he who ought to observe it is alone interested in it.<sup>u</sup> In the last case the *modus* is *simplex*; in all others *qualificatus*.

If the *modus* is impossible, the principal transaction does not thereby become void any more than in the case of affirmative conditions subsequent, but the stipulations as to user have no effect.<sup>v</sup>

If he who ought does not observe a possible *modus*, still he does not forfeit his right,<sup>w</sup> nor inasmuch as the disobedience of the person obliged confers no right on the person entitled to avoid the whole transaction,<sup>x</sup> can the latter, as a general rule, demand more than observance and damages.<sup>a</sup> Only in cases of innominate contracts and gifts can a return of the thing be demanded;<sup>b</sup> in the case of a gift in consideration of promised sustenance, an *actio in rem* may be maintained.<sup>c</sup> This is true even at the present day, and now,

donat. adiecti. Ien. 1804. C. G. Waechter de condict. caussa data caussa non secuta. Tubing. 1822. p. 88—89. Pfeiffer pract. Ausf. 1. B. Nr. 4. Rosshirt Vermächtnisse B. 1. 411. Savigny System B. 3. § 128. 129.

<sup>r</sup> L. 80. de cond. et demonstr. (35. 1.). I. Altamirani comm. ad quaest. Scaevolae. Tract. 8. ad L. 80. cit. in Meerman Th. T. 2. p. 494 *et seq.*

<sup>s</sup> But see *contra* on account of 58. § 2. locati (19. 2.) Glück Pand. B. 4. § 336.

<sup>t</sup> L. 17. §. 2. L. 44. de manum. testam. (40. 4.).

<sup>u</sup> L. 13. § 2. de donat. int. vir. et uxor. (24. 1.).

<sup>v</sup> L. 92. § 1. de legat. I. (30.) L. 17. pr. de legat. II. (31.) L. 8. C. de condict. ob caus. dator. (4. 6.). Waechter l. c. p. 99—102. The contrary opinion is held by Glück Pand. B. 4. § 336.

<sup>w</sup> Arg. L. 2. § ult. de don. (39. 5.). Schnauss l. c. § 4. 5.

<sup>x</sup> Weber üb. d. nat. Verb. § 90.

<sup>a</sup> Meister *loc. cit.* § 16.

<sup>b</sup> L. 2. 3. 6. 8. C. de condict. ob caus. dator. (4. 6.) L. 1. C. de donat. quae sub modo (8. 55.). Savigny System Bd. 4. § 175. Some as Glück *loc. cit.* erroneously extend this to all cases. Schnauss l. c. § 6—13. Waechter l. c. p. 110—117.

<sup>c</sup> L. 1. C. cit. A general rule is improperly deduced from this by Glück *loc. cit.* Note 21. Compare Schnauss l. c. § 14. Meyerfeld Lehre von d. Schenkungen B. 1. p. 413.

as formerly, the right to demand a return exists in the case of a pure gift. In other respects, however, there is no difference in modern times between nominate and innominate contracts.<sup>d</sup>

In cases of doubt as to the existence of a condition subsequent or a *modus*, the presumption is in favour of the latter, rather than of the former.<sup>e</sup>

<sup>d</sup> Schnauss l. c. § 14. is partly of a different opinion.

<sup>e</sup> Voet L. 35. T. 1. § 14. Savigny System B. 3. § 128.

## CHAPTER II.

## OF PERSONS OR THE SUBJECTS OF RIGHTS AND DUTIES.

## I.—LEGAL CAPACITY.

## § 101.

WE have next (§ 57) to consider the *subjects* of rights and duties, that is to say the persons to whom something is possible or necessary. In the first place we must examine who or what, either from its very nature or by the precepts of positive law, can be considered as capable of rights and duties.

By *Person* is meant whatever in any respect is regarded as the subject of a right: by *Thing* on the other hand is denoted whatever is opposed to person.<sup>f</sup>

The legal capacity of a person as fixed by positive law is called by the Romans *caput* or *status*.<sup>g</sup> Modern writers, however, make use of the expression *status civilis* to denote such capacity, together with all the peculiarities annexed to it by law and on which single rights depend; and by way of distinction they use the phrase *status naturalis* to denote natural legal capacity together with those physical properties which give rise to special legal consequences.

## 1.—Natural Status.

## A. HUMAN FORM.

## § 102.

In order that natural legal capacity<sup>h</sup> may be attributed to any

<sup>f</sup> pr. I. de iure person. (1. 3.) § 4. I. de cap. minut. (1. 16.) L. 20. § 7. qui test. fac. poss. (28. 1.).

<sup>g</sup> Taken in a general sense this includes *status libertatis, civitatis* and *familie*; pr. I. de cap. dem. (1. 16.) in a narrower sense only the 1st and 2nd. L. 3. § 1. L. 4. de cap. min. (4. 5.) L. 1. § 8. ad Sct. Tertyll. (38. 17.). Feuerbach civil. Vers. 1. B. Nr. 6. Compare Savigny System B. 2. Beil. 6.

<sup>h</sup> Savigny *ubi supra* § 61. 62.

one human form is essentially requisite : but it is not indispensable that the form if human be that ordinarily observed ; it may be very unusual (*portentum, ostentum*).<sup>i</sup> That which being born of a woman is wholly devoid of those physical features which are characteristic of the human race is called *monstrum*, and is not considered capable of having any right ;<sup>k</sup> but its existence is not allowed to depend on the mere will of its parents,<sup>l</sup> and such a monstrosity may for their advantage be deemed a child.<sup>m</sup>

## B. BIRTH.

### § 103.

A human being cannot be considered as the subject of rights unless actually born, i.e. in some way or other separated from its mother. That which is in the womb (*embryo* also sometimes called *venter*), is in strictness deemed part of the mother ;<sup>n</sup> but all those acts are forbidden which prevent the development or future birth of the fœtus.<sup>o</sup>

It is also laid down as a principle, that in those cases in which the child can be thereby benefited, its legal capacity is to be considered as dating from the time of conception, but in all other cases from the time of birth.<sup>p</sup>

## C. LIFE.

### § 104.

The human being must be born alive. Of this fact not only

<sup>i</sup> L. 38. de V. S. (50. 16.).

<sup>k</sup> L. 14. de stat. hom. (1. 5.). Haller gerichtl. Arzneiw. 1. Thl. p. 184. 185. C. L. Schweickhardt Beschreibung einer Missgeburt nebst einigen medic. Bemerk. über diesen Gegenstand. Tübing. 1801. 3. Abschn.

<sup>l</sup> Huber L. 1. T. 5. § 7. Somewhat different opinions are entertained, (partly from what is said by Haller *ubi supra* 190) by Leyser Sp. 15. cor. 2. Vol. IX. Sp. 47. M. 7. Müller ad Leyser Obs. 83.

<sup>m</sup> L. 135. de V. S. (50. 16.). Walch ad Eckhard herm. iur. § 199.

<sup>n</sup> L. 1. § 1. de ventr. inspic. (25. 4.) L. 9. § 1. ad L. Falcid. (35. 2.). Eckhard herm. iur. § 137. See upon this subject C. H. Mauchart über die Rechte des Menschen vor s. Geburt. Frkf. & Leipz. 1782.

<sup>o</sup> L. 18. de stat. hom. (1. 5.) L. 2. de mort. inf. (11. 8.) L. 3. de poen. (48. 19.).

<sup>p</sup> pr. I. de ingenuis (1. 4.) L. 18. 26. de stat. hom. (1. 5.) L. 7. § 1. de senator. (1. 9.).

a vocal sound, but any other well ascertained sign of life is legal evidence.<sup>9</sup> It is also commonly supposed that it is as necessary as birth itself that the child shall be born 182 days after conception, but this is only requisite in reference to the rights of *status*.<sup>†</sup>

### § 105.

**Proof of life and death.**—Birth and death must be proved by him who alleges them to have taken place. Proof of death has by modern usage been rendered comparatively easy, partly by the admission of evidence of a somewhat loose nature,<sup>\*</sup> and partly by presuming the death of a person who has disappeared and cannot be found, and who can be shown to be 70 years old.<sup>†</sup>

If several persons die<sup>‡</sup> and it cannot by any satisfactory evidence be discovered which died before the other,<sup>\*</sup> then if they died a natural death the eldest is usually presumed to have died first;<sup>§</sup>

<sup>9</sup> L. 3. C. de post. hered. inst. (6. 29.).

<sup>†</sup> L. 12. de stat. hom. (1. 5.) L. 3. § 12. de suis et legitim. (38. 16.) L. 2. 3. C. de post. her. (6. 29.). Seuffert Erört. einzeln. Lehren. 1. Abthl. Nr. 9. Savigny System B. 2. Beilage III. *Contra* Warnkönig in Rosshirt Zeitsch. B. 2. 442. For the different opinions and medical doubts upon this subject see W. G. Plouquet über die phys. Erfordernisse der Erbfähigkeit, Tub. 1779. § 71. 72. Cocceii I. C. L. 1. T. 6. qu. 3. Glück Pand. 28. B. 108—138. Elwers Themis B. 2. N. 14. Stryk U. M. P. L. 1. T. 5. § 14. C. A. Fabrot Ex. 1. de tempore partus humani (in Otto Th. T. 3.).

<sup>\*</sup> I. C. Finke de unius testis confessione, Goett. 1798. § 9. But see *contra* I. N. Hert de apertura testam. (op. V. 2. T. 3.) Sect. 1. § 14.

<sup>†</sup> Koch succ. ab intest. Auct. 1. Müller ad Leyser Obs. 240. Köchy Medit. 1. B. Nr. 23. Before this, *life* is to be presumed; see other opinions expressed by Heise and Cropp jurist. Abh. 2. B. Nr. 5. Bolley jurist. Aufs. 1. B. Stuttg. 1831. Nr. 3.

<sup>\*</sup> See generally I. F. de Retes de commorient. iure; in opuse. L. 7. c. 5. (Meerman Th. T. 6.). E. A. van Voorst de iure quod oritur ex commorientibus ad varia iur. Rom. loca, Ultrai. 1757. (Oelrichs Thes. nov. T. 2. V. 2. Nr. 9.). Glück v. der Intestat-Erbfolge § 4. Archiv für civilist. Praxis. B. 4. Nr. 27. T. H. F. Gaedcke de iure commorientium. Rostoch. 1830. Vangerow Leitfaden § 33. Anm. 2.

<sup>†</sup> The opinions of medical men are unreasonably excluded by Gaedcke l. c. p. 20—26. 142—146.

<sup>§</sup> On account of L. 15. pr. de inoff. test. (5. 2.). But to take the strongest view this law only applies to the case of parents and their children. In other cases the customary rule is to be followed. Savigny System B. 2. § 63.



but if their death was violent, the presumption is that neither died before or after the other; \* and this is so even in cases of married people.\* With respect, however, to parents and children there is, in the absence of all special reasons to the contrary,<sup>b</sup> a presumption that the children died first if they were under age, and last if not.<sup>c</sup> If some of the persons died a natural and the others a violent death, no legal presumption is directed to be raised, and consequently the general principle that neither can be presumed to have died before or after the other must be followed. It may of course happen that owing to the terms of a particular instrument these presumptions are not required to be acted upon.<sup>d</sup>

## 2. Civil Status.

### § 106.

*Status civilis* (§ 101) is of three sorts, *status libertatis*, *civitatis*, and *familie*, according as a person is or not free, a *civis*, and a member of a *familia*.\* The loss of *status* is termed *status mutatio*, or *capitis diminutio*, and may be *maxima*, *media* or *minima*, according as the loss is of the *status libertatis*, *civitatis* or *familie*.<sup>f</sup> The two first are also called *magna*, and the last, sometimes, *minor*.<sup>g</sup>

\* L. 9. pr. L. 16. pr. § 1. L. 18. de reb. dub. (34. 5.) L. 34. ad Sct. Treb. (36. 1.). A. Faber conl. L. 13. c. 14. 16. compared with Averan. int. L. 5. c. 31. n. 8.

\* L. 32. § 14. de don. int. V. et U. (24. 1.) L. 26. de mort. c. don. (39. 6.). Glück *loc. cit.* 14. 15.

<sup>b</sup> L. 17. § 7. ad Sct. Treb. (36. 1.). Voet comm. L. 24. T. 1. § 3. L. 36. T. 1. § 16. Voorda elect. c. 20.

<sup>c</sup> L. 9. § 1. § ult. L. 22. L. 23. de reb. dub. (34. 5.) L. 29. de vulg. subst. (28. 6.) L. 11. § 1. de captiv. (49. 15.). See more fully as to this, Gaedcke l. c. p. 61—85. 104—112. 116—122.

<sup>d</sup> This is the sense of L. 9. pr. de reb. dub. (34. 5.) and probably also of L. 17. § 7. ad Sct. Treb. (36. 1.).

\* Inst. L. 1. T. 3—8. Savigny System 2. B. § 65—67. Puchta *Cursus der Inst.* 2. Bd. § 220.

<sup>f</sup> Gaius I. 158—163. Tit. Inst. de cap. min. (1. 16.) Tit. Dig. de cap. min. (4. 5.) Löhr Mag. 4. B. Nr. 1. A. H. E. F. a Seckendorff de cap. dem. minima. Colon. 1828. Savigny System 2. B. § 68—75. and Beilage VI.

<sup>g</sup> L. 1. § 4. de suis (38. 16.) L. 5. § 3. de extr. cogn. (50. 13.) Noodt obs. l. 2. c. 21.

## § 107.

**Actiones præjudiciales.**—Actions relating to *status* are called *actiones præjudiciales*, and are divided into affirmative, if their object is to have a status recognised, and negative if their object is the contrary. For the purpose of preventing cases of unlawful and oppressive detention, every free man is entitled to the *interdictum de libero homine exhibendo*.<sup>b</sup> The right to enquire into the status of a person deceased, lasts only five years.<sup>i</sup> It is not necessary to examine further into the law relating to *status*, for what is obsolete with respect to the *status libertatis* and *civitatis* is matter for legal history, and what is of present importance is within the province of writers on modern and not Roman law. The law concerning the *status familiæ* moreover can only be explained when the doctrines relating to *patria potestas* are examined.

## II.—OF ONE PERSON WITH SEVERAL RIGHTS.

## § 108.

Several persons may be the subjects of one right or of one duty, and one person may be the subject of several rights or several duties.<sup>k</sup> With respect to the latter it is only necessary here to observe that :

1. If several rights and duties meet in the same person and are not extinguished by the principles before (§ 83) laid down each right may be exercised by, and each duty enforced against that person to its full extent.<sup>l</sup>

2. If one only of such rights can be exercised, the choice lies, as a general rule, with the person in whom they reside ;<sup>m</sup> and

<sup>b</sup> Tit. D. de hom. lib. exhib. (43. 29.). Schilter ex. 23. § 25.

<sup>i</sup> Tit. D. ne de statu defunct. (40. 15.) tit. C. cod. (7. 21.) Puchta *ubi supra*. § 221.

<sup>k</sup> L. 3. de adopt. (1. 7.) I. N. Hert de uno homine plures sustinente personas. Giess. 1699. (in op. Vol. 1. T. 3. p. 27.)

<sup>l</sup> Koch success. ab intest. Auct. III. § 1.

<sup>m</sup> L. 12. pr. de legat. I. (30.). Hert l. c. Sect. 1. § 3. 5. Mevius P. 1. Dec. 291.

3. What a person may do in one capacity does not prejudice him in any other capacity.<sup>n</sup>

### III.—OF SEVERAL PERSONS WITH ONE RIGHT OR DUTY.

#### 1. *Communio*.

##### § 109.

When one undivided right is vested in several persons it is a rule that each of them has a proportional, and in cases of doubt an equal share of the whole, and where one undivided duty is vested in several persons each is only liable in respect of a similar share.<sup>o</sup>

Several persons in whom one undivided right is vested (and which right is not apportionable of itself like a claim for money<sup>p</sup>), form what is called a *communio*. The consequence of such a state of things is that each person has an ideal equal or unequal share of the entirety, and that his right extends over every part (*pro indiviso*) of that which is the object of the *communio*.<sup>q</sup> If the right be a right *in rem* the word *condominium* is used instead of *communio*.

##### § 110.

A *communio* may extend either only to single or to the collected rights of different persons;<sup>r</sup> in the former case it is termed *particular*, in the latter *universal*. If the *communio* does not spring from a contract but arises in some other manner,<sup>s</sup> it is usually termed a *communio incidens*.<sup>t</sup>

##### § 111.

Each member of a *communio* can freely deal with his own share,

<sup>n</sup> § 4. I. de inoffic. testam. (2. 18.) L. 2. § 19. ad SCt. Tert. (38. 17.) L. 26. C. de administr. tut. (5. 37.).

<sup>o</sup> L. 29. pr. pro socio (17. 2.) L. 11. § 1. de duob. reis (45. 2.). G. L. Crell de præsunt. æqualitatis in iudic. divisor. (Diss. T. IV. n. 12.).

<sup>p</sup> L. 2. § 5. L. 4. pr. L. 25. §. 1. fam. herisc. (10. 2.).

<sup>q</sup> L. 16. pr. l. c. L. 19. si servit. vindic. (8. 5.) L. 6. § 8. commun. divid. (10. 3.) L. 3. § 2. qui pot. in pignor. (20. 4.) L. 7. § 4. quib. mod. pign. solvit (20. 6.).

<sup>r</sup> L. 5. pr. pro socio (17. 2.).

<sup>s</sup> For example L. 31. 32. eod. § 27. I. de rer. divis. (2. 1.).

<sup>t</sup> On account of L. 25. § 16. fam. ere. (10. 2.).

provided (as in the case of alienation) the rights of the other members are not thereby injured,<sup>a</sup> and he can insist upon the dissolution of the *communio*, notwithstanding any agreement or provision to the contrary.<sup>x</sup> Every other dealing, every encroachment on the rights of the other members is, so far as it is such, illegal and void,<sup>y</sup> unless indeed the dealing or encroachment be necessary for the preservation of the common rights,<sup>z</sup> or be wholly uninjurious to the others interested.<sup>a</sup> Even the majority of a *communio* cannot bind a dissenting minority, and still less can the few control the will of the many.<sup>b</sup>

## 2. Corporations.

### § 112.

Care must be taken not to confound the rights last mentioned with the rights of corporations.<sup>c</sup> This subject ought, strictly speaking, to be discussed amongst the rights peculiar to particular persons; but, for the sake of contrast, the following observations had better be made here.

### A. NATURE OF A CORPORATION.

### § 113.

Every association of persons possessing the right of forming out of its members, taken collectively, one single moral person,<sup>c</sup> (*corpus*) is termed a corporation, *universitas*, *collegium*.<sup>d</sup> In order

<sup>a</sup> L. 1. L. 3. C. comm. div. (3. 37.) L. 68. pr. pro soc. (17. 2.) L. 28. comm. div. (10. 3.).

<sup>x</sup> L. 14. § 2. comm. divid. (10. 3.) L. 59. pro soc. (17. 2.). The *fiscus* can by buying the thing itself cause a dissolution. L. un. C. de vend. rer. fisc. (10. 4.). *Gesterding v. Eigenthum* 53. 54.

<sup>y</sup> L. 2. de servitut. (8. 1.) L. 1. 4. C. commun. rer. alienat. (4. 52.).

<sup>z</sup> L. 52. § 10. pro soc. (17. 2.) L. 4. C. de aedific. privat. (8. 10.).

<sup>a</sup> L. 13. § 1. de S. P. U. (8. 2.). *Leyser* Sp. 118. m. 1. C. 1. compared with *Wernher* lect. comm. L. 10. T. 3. § 7.

<sup>b</sup> L. 28. comm. divid. (10. 3.) L. 10. pr. de aqua et aqu. plu. arc. (39. 3.). *Struben* 5. Bd. 30. *Bed.* *Pufendorf* T. 1. Obs. 125.

<sup>c</sup> *E. Wippermann* das gemeine deutsche Recht. Hft. 1. Leipz. 1839. p. 78.

<sup>d</sup> *Savigny* System B. 2. § 85—102. *G. F. Puchta* in *Weiske Rechtslexikon* B. 3. p. 65—79.

<sup>e</sup> *C. S. Zachariae liber quaestionum*. Viteb. 1805. p. 61. *Christiansen Institutionen*. Altona, 1843. p. 143.

to be recognised by law (*collegium licitum*), the creation of the corporation must have been authorised by the Emperor.<sup>f</sup> The power, in cases of doubt, of admitting at pleasure other persons, follows of itself, provided (so at least it is laid down) they are not members of another corporation.<sup>g</sup> At its commencement a corporation must consist of at least three members, but its existence may be continued by one,<sup>h</sup> and so its members may be wholly changed without its becoming a new person.<sup>i</sup> In modern times it is usual to call those corporations which are instituted by the state for some public purpose, *collegia*, and if several of these again form one whole, to term it a *Corpus*.<sup>k</sup>

## B. POWER OF A CORPORATION.

### § 114.

When a corporate body has duly made a resolution—that is when all the members have been summoned in the ordinary way, and at least two-thirds have assembled and a majority of them have determined upon something, this resolution of the majority is a law for the regulation of all corporate dealings,<sup>l</sup> and is binding upon all the members of the body.<sup>m</sup> Persons who are minors

<sup>f</sup> L. 1. L. 3. § 1. de colleg. et corp. (47. 22.) L. 1. pr. quod cuiuscunque univ. nom. (3. 4.) cap. 7. X. de privil. (5. 33.). Heineccius D. de colleg. et corpor. opificum (op. var. syllog.). Wassenaer ad Tit. D. de colleg. et corpor. (in Fellenberg iurispr. R. T. 1.). Dirksen civil. Abh. B. 2. Nr. 1.

<sup>g</sup> L. 1. § 1. de colleg. (47. 22.) L. 10. C. de assessor. (1. 51.) cap. 5. X. de praebe. (3. 5.) cap. 3. X. de cleric. non resident. (3. 4.). Leyser Sp. 559. m. 4. Schilter Ex. 49. § 54. Wening Lehrb. 1. B. § 100. on account of L. 27. pr. ad municip. (50. 1.) is of a different opinion.

<sup>h</sup> L. 7. § ult. quod cuiusc. univ. nom. (3. 4.) L. 85. de V. S. (50. 16.).

<sup>i</sup> L. 76. de iudic. (5. 1.).

<sup>k</sup> Stryk U. M. L. 47. T. 22. § 1. See *contra* Savigny System B. 2. § 88. p. 260. The so called *pia corpora*, (upon which Mühlenbruch Pand. B. 1. § 201. may be consulted) are certainly not always a moral person. Kori in Zeitschr. f. Rechtspflege. Leipz. 1839. B. 2. Nr. 17.

<sup>l</sup> *Contra* Savigny System B. 2. § 97—99.

<sup>m</sup> L. 3. quod cuiuscunque univ. nom. (3. 4.) L. 19. ad municip. (50. 1.) L. 3. de decret. (50. 9.) L. 45. C. de decur. (10. 31.) L. 2. 3. C. de praed. decur. (10. 33.) cap. 42. X. de elect. (1. 6.). This old doctrine has been much disputed in modern times. Compare Lotz civilist. Abh. 110. A. Lang de decretis ab ordine faciendis. Erlang. 1828. v. Langenn u. Kori Erört. 2. B. Nr. 2.

ought, in the opinion of many writers, to be summoned like other members.<sup>a</sup> No general summons is, however, requisite if the management of the affairs of the corporation is entrusted to certain persons;<sup>o</sup> but, again, the consent of each individual must be obtained in order that the rights vested in him as such may be affected.<sup>p</sup> In *Collegia* the assembly of two-thirds of the numbers is in modern times frequently dispensed with.<sup>q</sup>

### C. THE LEGAL RELATIONS OF A CORPORATION.

#### § 115.

The legal relations of a corporation and its members depend upon the following principles :

1. A corporation as an ideal person is capable of suing and being sued,<sup>r</sup> and, according to some, can become obnoxious to law by committing crimes.<sup>s</sup>

2. As it is the will of the majority which makes a corporation the subject of rights and duties,<sup>t</sup> the, in many respects, most important principle follows that no individual member has *pro rata* any share either in the rights or duties of the body

<sup>a</sup> Stryk U. M. P. L. 3. T. 4. § 10. Wesenbeccius comm. eod. Tit. n. 5.

<sup>o</sup> Riccius v. Stadtges. 2. B. 6. Hptst. § 3.

<sup>p</sup> L. 5. in fin. C. de auctor. praestand. (5. 59.) L. 28. comm. divid. (10. 3.) cap. 29. 56. de R. I. in 6. (5. 12.).

<sup>q</sup> Mevius ad ius Lubec. L. 1. T. 1. Art. 2. n. 26. 27. Müller ad Leyser Obs. 938.

<sup>r</sup> L. 7. pr. L. 9. quod cuiuscunque univ. nom. (3. 4.) Savigny System B. 2. § 91—93. Sintonis Civilr. B. 1. § 15.

<sup>s</sup> This is a much disputed question, and belongs entirely to the province of criminal law.

<sup>t</sup> Compare Hommel Rhaps. Obs. 187. Hartleben med. ad P. Sp. 3. m. 2. Müller ad Leyser Obs. 40. Carpzov P. 2. C. 6. Def. 24. I. G. Bauer civis novus ad collect. ob debitum civit. antiquum obligatus. Lips. 1741 (opusc. T. 1. n. 10.). Leyser Sp. 131. m. 5. Mevius P. 8. Dec. 275. W. A. Lauterbach de confusione. § 36. Carpzov P. 1. C. 13. Def. 9. Idem Resp. L. 2. n. 65. Kind quaest. for. T. 3. n. 29. Gönner jurist. Abh. Thl. 2. Nr. 13. § 1. Especially I. L. Gaudlitz de finibus inter ius singulorum et universitatis regundis. Lips. 1804 (printed by Haubold at the end of Haubold opusc. T. 2. p. 547—621.). v. Langenn u. Kori Erört. 2. B. 1—69. Bolley vermischte Auff. Stuttg. 1831. Nr. 10.

corporate,<sup>a</sup> or can insist upon any separate enjoyment of the corporate property, unless by virtue of some special provision. If there be any such provision, that property which is enjoyed by all the members, is termed *res universitatis sensu stricto*, whilst that of which there is no common user, is called *patrimonium universitatis*.<sup>x</sup>

3. Subject to the superintendence of the supreme power,<sup>y</sup> a corporation can freely dispose of the property which it has acquired in an unqualified manner, and can therefore divide such property amongst its own members.<sup>z</sup> A division, and the mode in which it is to be made, can be determined on by a majority, but if the majority do not settle the mode of division, it must be made, subject to the acquired rights of individuals,<sup>a</sup> amongst all the members *per capita*.<sup>b</sup> Seeing that after the dissolution of a corporation no resolution as to the division of its property can be made, such of it as remains undisposed of is to be treated as *bona vacantia*.<sup>c</sup>

4. A corporation can have a common seal ;<sup>d</sup>

5. And can generally, so far as a *restitutio in integrum* is concerned, claim rights similar to those of minors.<sup>e</sup>

<sup>a</sup> L. 6. § 1. de rer. div. (1. 8.) L. 7. § 1. quod cuiusc. univ. nom. (3. 4.) L. 10. § 4. de in ius voc. (2. 4.) L. 1. § 15. ad. Sct. Treb. (36. 1.) L. 1. § 7. de quaest. (48. 18.).

<sup>x</sup> Höpfner Comm. § 275.

<sup>y</sup> S. Stryk de alienat. rer. et. bonor. univ. Idem, de iure principis circa rationes civitat. (in Diss. collect.). Leyser Spec. 664. G. L. Boehmer de iure principis circa loca et opera publica (Elect. i. c. T. 1. Nr. 15.).

<sup>z</sup> L. 4. de colleg. et corp. (47. 22.) L. 5. de decret. ab ord. fac. (50. 9.) Tit. C. de praed. decur. (10. 33.). *Contra* Savigny System B. 2. § 99.

<sup>a</sup> See the former section and also Ende jurist. Abh. Nr. 10.

<sup>b</sup> Jenaische A. L. Z. v. J. 1804. Nr. 241. Thibaut civil. Abh. 381—403. *Contra* Runde Beitr. zur Erl. rechtl. Gegenst. 1. B. Nr. 1. Krüll Prüf. einz. Theile des bürgerl. R. 2. B. Nr. 1. Gönner über Cultur und Vertheilung der Gemeindeweiden. Landsh. 1803. Haubold l. c. § 3. 4.

<sup>c</sup> Leyser Spec. 559. M. 12. 13. Marezoll in Löhr Magaz. 4. B. 207—212. Of a different opinion are Müller ad Leyser Obs. 888. on account of L. 3. pr. de colleg. et corp. (47. 22.). and Puchta Pandekten. Leipz. 1844. § 564. Note i. on account of L. 5. C. de pagan. (1. 11.). In case a corporation is split up into others a division *pro rata* is certainly the most natural. Bolley *loc. cit.*

<sup>d</sup> I. H. Boehmer de iure et auctor. sigilli authentic. Hal. 1742.

<sup>e</sup> See Thib. Syst. § 620.

6. In the last place, every member, so far as he is capable,<sup>a</sup> is bound to take upon himself and bear the *honores* and the *munera personalia, realia* and *mixta* of the corporation,<sup>f</sup> unless he can show some special ground of exemption or that he is released therefrom by the supreme power<sup>h</sup> (*immunitas, vacatio*).

#### D. OF CORPORATE OFFICERS.

##### § 116.

The affairs of a corporation may either be managed by itself or be entrusted to directors<sup>i</sup> (*actores, syndici, administratores*). In the latter case the corporation is termed a *universitas ordinata*. The duties of such directors are as follows: to undertake their office after giving proper security;<sup>k</sup> to attend to their business with that diligence which is required from the guardian of a minor;<sup>l</sup> to keep and produce proper accounts; and to be prepared to answer all questions which may be put to them at the proper time.<sup>m</sup>

The acts of the directors are binding on the corporation if within the limits of their authority, but otherwise only so far as advantage can be proved to have accrued to the corporation therefrom.<sup>n</sup>

<sup>a</sup> L. 9. L. 14. pr. § 1. L. 18. de mun. et honor. (50. 4.) L. 18. L. 214. L. 239. § 3. de V. S. (50. 16.).

<sup>b</sup> L. 6. pr. § 1. L. 11. L. 14. § 3. de mun. et honor. (50. 4.).

<sup>c</sup> Tit. D. de vacat. et excusat. mun. (50. 5.) Tit. D. de iure immun. (50. 6.) Codex L. 10. Tit. 25. 44—52. 64. Malblanc princ. iur. Rom. § 107. 108.

<sup>d</sup> L. 1. § 1. quod cuiusc. univ. nom. (3. 4.) L. 18. § 13. de mun. et hon. (50. 4.).

<sup>e</sup> L. 3. § ult. de admin. rer. ad civ. pert. (50. 8.). See an exception in L. 9. § 7. eod.

<sup>f</sup> L. 2. § 2. L. 6. eod. Tit. C. de praed. decur. sine decret. non alien. (10. 33.).

<sup>g</sup> L. 2. § 2. L. 8. D. eod. L. 13. § 1. de div. temp. praeser. (44. 3.). Leyser Vol. 11. Spec. 677. M. 3—8. comp. with Müller ad Leyser Obs. 940. 941.

<sup>h</sup> L. 27. de reb. cred. (12. 1.) L. 6. de decret. ab ord. fac. (50. 9.) Nov. 120. c. 6. § ult. See for the different views taken of this matter C. L. Crell de senatoribus et quat. ex eorum factis civitas teneatur. Vit. 1736. (Diss. F. 4. n. 26.). Leyser Sp. 131. M. 11. Müller ad Leyser Obs. 289—292. 939. Glück Pand. 12. B. § 782.



## § 117.

**Duties of several directors.**—If loss is incurred through the fault of the directors of a corporation, their responsibility depends upon the following considerations : °

I. If the director in fault was doing that which by a public resolution of the body corporate (for a private arrangement amongst the directors goes for nothing <sup>p</sup>) he was authorised to do alone, without being subject to the control of his colleagues, he alone must bear the consequences.<sup>q</sup>

II. But in other cases all the directors are answerable for the misconduct of each ;<sup>r</sup> nevertheless the acting director must first be proceeded against,<sup>s</sup> and, where there is no fraud complained of, the *exceptio divisionis* (§ 400.) is admissible,<sup>t</sup> and he to whom no blame attaches is to be wholly absolved.<sup>u</sup> In case of misconduct on the part of a magisterial officer, his colleagues, if answerable at all upon the principles just laid down, are not so at all events until after proceedings have been taken against the sureties of the officer and those who nominated <sup>x</sup> him.<sup>y</sup> In other cases the colleagues of the acting director are answerable before or after his sureties and nominators, according as the management of the affairs of the corporation was or not entrusted to all alike.<sup>z</sup> Moreover penalties

° It is doubted whether the following principles apply to modern German city corporations, see Funke Beitr. Chemnitz 1830. Nr. 2. and also v. Langenn u. Kori Erört. 2. Th. Nr. 3.

<sup>p</sup> L. 2. § 8. L. 3. pr. de admin. rer. ad civ. pert. (50. 8.). On the substitution of a third, see Leyser Vol. XI. Sp. 680. M. 33.

<sup>q</sup> L. 3. pr. cit. L. 1. pr. de magistr. conv. (27. 8.). Leyser Vol. 11. Sp. 680. M. 8. compared with Müller ad Leyser Obs. 943.

<sup>r</sup> L. 11. pr. ad municip. (50. 1.) L. 1. C. quo quisque ord. (11. 35.)

<sup>s</sup> L. 1. § 9. de magistr. conv. (27. 8.) L. 1. C. quo quisque ord. (11. 35.).

<sup>t</sup> L. 7. de magistr. conv. (27. 8.). Leyser l. c. M. 43.

<sup>u</sup> L. 14. de admin. tut. (26. 7.) L. 9. § 8. de admin. rer. ad civ. (50. 8.) L. 4. C. de perio. tut. (5. 38.) L. 2. C. de usur. pupillar. (5. 56.) L. 4. in f. C. quo quis ord. (11. 35.)

<sup>x</sup> I.e. those who proposed incapable persons : L. 2. C. qui pet. tut. (5. 31.) L. 1. 4. C. de magistr. conv. (5. 75.) L. un. C. de pot. ad mun. (10. 65.). Compare Müller ad Leyser Obs. 611.

<sup>y</sup> L. 11. 12. 13. ad munic. (50. 1.) L. 3. 4. C. quo quisque ord. (11. 35.).

<sup>z</sup> L. 2. C. eod. Puchta Pandekten. Leipz. 1844. § 358.

incurred by a director do not fall on either his sureties or colleagues.<sup>a</sup> It need scarcely be stated, that execution against a director can only affect his property, and not that of the body corporate,<sup>b</sup> or that no officers or their heirs are liable for the consequences of acts committed by others than themselves before the commencement or after the expiration of their office.<sup>c</sup>

### 3. Of persons obliged and entitled in *solidum*.

#### § 117 A.

The rule that in cases of doubt there is a presumption in favour of proportional rights (§ 109) does not apply where on peculiar grounds the legal relation existing between several persons is *in solidum*, or of a joint and several character; that is, where any one of several persons obliged can be required to perform the entire duty (passive solidarity) and any one of several persons entitled can require performance to himself of the entire duty (active solidarity).

If the right of the several persons thus entitled, or the duty of the several persons thus obliged is identical, and if the right or duty arises from a simultaneously combined expression of will, such persons are termed *Correi*; those thus obliged being *correi debendi*, or, in case of a stipulation, *correi promittendi*, and those thus entitled being *correi credendi*, or, if entitled by a stipulation, *correi stipulandi*.<sup>d</sup>

There are, however, cases in which persons may be jointly and severally entitled or obliged, and yet not be *correi*; <sup>e</sup> and where it is necessary to distinguish rights and duties *in solidum*, but not correal, from rights and duties which are both *in solidum* and

<sup>a</sup> L. 68. pr. de fid. et mand. (46. 1) L. 17. § ult. ad munic. (50. 1.).

<sup>b</sup> Compare Müller l. c. Obs. 943. in f.

<sup>c</sup> L. 1. C. de perie. nom. (11. 33.) L. 9. § 9. de admin. rer. ad civ. pert. (50. 8.) L. 23. C. de decurion. (10. 31.).

<sup>d</sup> Tit. I. de duob. reis (3. 16.) Tit. D. eod. (45. 2.). See generally I. Roncagallus de duob. reis. Marpurgi 1622. G. J. Ribbentrop zur Lehre v. d. Correal-obligationen. Götting. 1831.

<sup>e</sup> For example L. 1. § 10—L. 4. de his qui effud. (9. 3.) L. 1. C. de condict. furt. (4. 8.) L. 18. § 1. de admin. tut. (26. 7.). Ribbentrop 44—84. 89—106.

correal, the former are in the present work always denoted by the phrase *in solidum in a narrow sense*, whilst, where it is not necessary to distinguish the two, the simple expression *in solidum* is employed to denote both.

### § 117 B.

**How such rights and duties arise.**—Rights and duties *in solidum* may be created :

1. By agreement : in this way especially correal rights and duties arise even if the agreement has not the form of a stipulation.<sup>h</sup>

2. By testament ; where the correal duty springs from the connection of the words of the instrument.<sup>i</sup>

3. By necessity ; when the indivisibility of the object gives rise to rights and duties *in solidum in a narrow sense*.<sup>k</sup>

4. By law ; which imposes a similar duty on co-wrong doers in respect of the damages to be borne by them,<sup>l</sup> and a correal duty on co-sureties as such.<sup>m</sup>

Several other cases are mentioned in their proper places in the *System*.

### § 117 C.

**Rights in solidum.**—With respect to the effects of active solidarity which continues for all the joint creditors as long as it is retained by one,<sup>n</sup> it is to be observed that :

<sup>h</sup> L. 9. pr. h. t. (45. 2.). Difficulties arise from the following laws : L. 5. § 15. commod. (13. 6.) L. 1. § 43. depos. (16. 3.) L. 31. § 10. de aedil. edict. (21. 1.). Compare Ribbentrop 119—178. Unterholzner Schuldverhältnisse B. 1. § 89.

<sup>i</sup> L. 8. § 1. de legat. I. (30.) L. 9. pr. h. t. (45. 2.).

<sup>k</sup> L. 2. § 2. de V. O. (45. 1.) L. 192. pr. de R. I. (50. 17.). See too Ribbentrop 178—241.

<sup>l</sup> L. 1. § 4. de eo per quem (2. 10.) L. 1. § 10—L. 4. de his qui effud. (9. 3.) L. 5. pr. de noxal. act. (9. 4.) L. 3. pr. si mensor. (11. 6.) L. 1. C. de cond. furt. (4. 8.). Ribbentrop 91—106.

<sup>m</sup> L. 28. § 1. L. 42. § 1—3. de iureiur. (12. 2.). Only duties *in solidum in a narrow sense* however exist in the very similar case of a *mandatum qualificatum*, Thib. Syst. (§ 447). L. 28. mandati (17. 1.) L. 95. § 10. de solutt. (46. 3.) (and indeed also for co-sureties according to) L. 28. C. de fideiuss. (8. 41.). Ribbentrop 85—87. (See Thib. Syst. § 400. Note c.).

<sup>n</sup> L. ult. C. h. t. (8. 40.).

1. Any one of the creditors can demand the whole from the debtor, and can consequently, after *litis contestatio*, exclude the other creditors, and by accepting payment entirely discharge the debtor.<sup>o</sup>

2. If the creditor who receives the whole has not rendered himself liable to share it with the others, he can retain the whole for himself.<sup>p</sup>

3. With respect to correal rights and duties the following acts are equivalent to payment, namely, Acceptilation (i.e. a solemn release), Novation (i.e. a substitution of another duty), a judicial decision declaring the complete invalidity of the debt, and oaths which represent the demand to be unjust.<sup>q</sup> In case of a right *in solidum in the narrow sense*, those jointly interested are not thus prejudiced.<sup>r</sup> A mere release by one creditor never prejudices the others,<sup>s</sup> and it is contrary to law to maintain with most persons<sup>t</sup> that a release by one affects the others to this extent that they cannot recover from the debtor that which they must *pro rata* give to that one after the debt is discharged. Such a doctrine only obtains in cases of *confusio*.<sup>u</sup> With respect to *compensatio* (i.e. set off) on the other hand, it is a principle that liquidation of the debt to one creditor by a set off actually made, affects the other creditors in the same way as payment; but they are not

<sup>o</sup> § 1. I. h. t. (3. 16.) L. 9. de V. O. (45. 1.) L. 2. L. 16. h. t. (45. 2.) L. 57. § 1. de solut. (46. 3.).

<sup>p</sup> L. 62. pr. ad L. Falcid. (35. 2.). Voet L. 45. Tit. 2. § 7. The contrary is, without the slightest ground, maintained by Hellfeld I. F. § 1906.

<sup>q</sup> L. 2. h. t. (45. 2.) L. 31. § 1. de novat. (46. 2.) L. 13. § 12. L. 16. pr. de acceptilat. (46. 4.) L. 28. §. 1. 3. L. 42. § 1. 3. de iureiur. (12. 2.) Lauterbach colleg. L. 45. T. 2. § 16. 29. Sammlung der Römischen Gesetze. Frkf. 1785. p. 52. 53. G. L. Hübel D. reus. stipulandi num paciscendo et novando correo noccat. Lips. 1822.

<sup>r</sup> L. 2. de transact. (2. 15.) L. 52. § 3. de fideiuss. (46. 1.) L. 1. C. de transact. (2. 4.) Ribbentrop 259—273.

<sup>s</sup> L. 27. pr. de pact. (2. 14.) L. 34. pr. de recept. (4. 8.). Cuiac ad L. 27. pr. de pact. Froben on § 137.

<sup>t</sup> Compare Glück Pand. B. 4. § 339. Note 70. and Sammlung der Röm. Gesetze. p. 52. Note a.

<sup>u</sup> Arg. L. 71. pr. de fideiuss. (46. 1.).

affected by the circumstance that the claim of one of them is liable to be met by a defence of set off.\*

§ 117 D.

**Duties in solidum.**—The effects of passive solidarity are as follows.

1. Any one debtor can, unless the creditor has renounced his right,<sup>7</sup> be sued for the whole or a part of the debt, even though it has ceased as regards the *person* of his co-debtors;<sup>2</sup> moreover, the institution of an action does not (now) prejudice the creditor as regards the other debtors even in case of correal duties.<sup>3</sup> Payment however of the whole debt by any one debtor discharges all the others;<sup>4</sup> and, at least according to practice,<sup>5</sup> a debtor who is sued for the whole can by the *exceptio divisionis* require the others also to be sued for their proportion, and this *exceptio* frees him for ever as regards their shares.<sup>6</sup> But this privilege does not extend to merchant debtors,<sup>4</sup> nor to cases where the joint liability arises from delict, nor can it be made available unless the co-debtors can be sued without trouble. No debtor can however by an *exceptio ordinis* or *excussionis* require the creditor to go solely against a co-debtor, unless such a course be allowed by some

\* L. 4. qui pot. in pign. (20. 4.). For the different views of others see Glück *loc. cit.* Note 75.

<sup>7</sup> Here also may belong the case where he sues each of the debtors for his proportion. L. 8. § 1. de leg. I. (30.) L. 51. § 4. de fideiuss. et mand. (46. 1.) L. 18. C. de pact. (2. 3.) L. 16. C. de fideiussor. (8. 41.). Glück Pand. § 339. Note 78. Lauterbach coll. L. 45. T. 2. § 21. v. Bülow Abh. 2. Thl. Nr. 18. Kritiz Sammlung v. Rechtsfällen B. 3. Nr. 11.

<sup>2</sup> L. ult. h. t. (45. 2.). Lauterbach l. c. § 25.

<sup>3</sup> L. 28. C. de fideiussor. (8. 41.). Ribbentrop 41—44. 267. 268.

<sup>4</sup> L. 1. § 43. deposit. (16. 3.).

<sup>5</sup> Especially on account of L. 47. locat. (19. 2.) L. 1. § 11. de tutel. et rat. (27. 3.) Nov. 99. c. 1. Glück *loc. cit.* Note 86. 87. 88. Against this practice see G. Asverus Spec. ad Nov. 99. Ien. 1822. Burchardi im Archiv f. civ. Prax. B. 19. Nr. 3. Heimbach in Linde Zeitschr. B. 16. p. 65. Schröter in Linde Zeitschr. B. 6. Nr. 12.

<sup>6</sup> Lauterbach l. c. § 23.

<sup>7</sup> Pauli sent. I. 20. § 4. I. de fideiuss. (3. 20.) L. 26. eod. (46. 1.) Nov. 99. Wenig in Linde Zeitschr. 4. B. Nr. 17. Archiv f. civ. Prax. B. 16. Nr. 12.

express law which is by many supposed to be the case when the debt arises from a receipt on the part of the other alone.<sup>f</sup>

2. If one *correus debendi* has paid the whole, the better opinion is that he cannot as a rule require contribution from the others unless they are on special grounds bound to make it; nor can he, if he neglected to repel the creditor's action.<sup>g</sup> Those who admit that co-debtors can avail themselves of the *exceptio divisionis* ought, however, clearly to exclude from the rule just mentioned cases where the party paying was in a position really to protect himself by that *exceptio*, but did not in order to benefit the others.

3. That which is equivalent to payment is equally a discharge of the other debtors;<sup>h</sup> a mere release of one has not this effect, but the others may take advantage of it against the creditor *ope exceptionis*, if the release was not expressly confined to the person of the parties thereto, and the co-debtors are in a position to claim contribution from the releasee to the extent of any payment made by them.<sup>i</sup> On the other hand if the creditor becomes the successor of one debtor,<sup>k</sup> or if one debtor can set up a defence by way of set off,<sup>l</sup> the co-debtors are only discharged to the amount of the share of that one.

4. No debtor is prejudiced by the delay of his co-debtor.<sup>m</sup> In other matters however stricter rules apply, at least to *correi debendi*.<sup>n</sup>

<sup>f</sup> Lauterbach l. c. § 20.

<sup>g</sup> L. 39. de fideiussor. (46. 1.) L. 76. de solut. (46. 3.) L. 2. C. h. t. (8. 40.). Faber coniect. L. 11. c. 6. Vinnii quaest. sel. L. 1. c. 6. *Contra* Sell in Linde Zeitschr. B. 3. Nr. 21. B. 4. Nr. 2, and against him Schröter in Linde Zeitschr. B. 6. Nr. 12.

<sup>h</sup> What is said in the latter part of Thib. Syst. § 399 is applicable here.

<sup>i</sup> L. 21. § ult. L. 23. in fin. L. 24. L. 25. pr. de pactis (2. 14.) L. 62. pr. ad leg. Falcid. (35. 2.) L. 34. pr. de recept. (4. 8.) L. 3. § 3. de liberat. leg. (34. 3.) comp. with L. 9. § 1. de duob. reis (45. 2.) Faber coniectur. L. 11. c. 18. Vinnius *loc. cit.* The practical application of these principles is denied by Guyet Abh. Nr. 11. on grounds which are well examined in Schmitthenner über Verträge. Giess. 1831. 172—175.

<sup>k</sup> L. 71. pr. de fideiuss. (46. 1.) Lauterbach de confusione § 49.

<sup>l</sup> L. 10. de duobus reis (45. 2.).

<sup>m</sup> L. 173. § 2. de R. I. (50. 17.). Compare Madai von. der Mora § 60.

<sup>n</sup> L. 18. h. t. (45. 2.) Ribbentrop 28—37. *Contra* Wolff zur Lehre v. d. Mora § 12.

#### IV.—OF THE PERSONAL PECULIARITIES WHICH AFFECT RIGHTS AND DUTIES.

##### § 118.

Subjects of rights differ much in their natural peculiarities; but of these, those only concern a jurist which give rise to legal consequences,<sup>d</sup> either by being the foundation of the legal capacity of a person or by influencing his various rights (*status naturalis*).<sup>e</sup> The former has already been discussed (§ 102—107), and the latter alone has consequently now to be examined.

##### 1. Sex.

##### § 119.

With respect to their sex, human beings are men, women, or to some extent both together, in which last case they are called hermaphrodites.<sup>f</sup> In hermaphrodites both sexes may be present in an equal degree or one of the sexes may be developed to a greater extent than the other. The last case is alone provided for by law, which attributes to such a hermaphrodite the rights of that sex which is predominant.<sup>g</sup> If a case should occur in which both sexes are equally developed, the general opinion<sup>h</sup> which allows the hermaphrodite to choose the sex to which he or she will belong would be open to much observation, and it would be extremely difficult to determine whether such a person should or not be allowed, at least once, to alter the choice originally made.<sup>i</sup>

##### § 120.

In cases of doubt the rights of both sexes are equal.<sup>k</sup> The exceptions<sup>l</sup> to this rule should be mentioned each in its proper

<sup>d</sup> Schilling Institut. B. 2. § 38.

<sup>e</sup> Savigny System B. 2. p. 445. disapproves of this expression.

<sup>f</sup> Haller gerichtl. Arzw. part I. c. 14.

<sup>g</sup> L. 10. de stat. hom. (1. 5.)

<sup>h</sup> Stryk de iure sens. D. 1. c. 1. § 62.

<sup>i</sup> See Cocceii I. C. L. 1. T. 5. qu. 3.

<sup>j</sup> L. 195. pr. de R. J. (50. 17.) L. 9. de stat. hom. (1. 5.).

<sup>k</sup> Compare B. Carpzov de iurib. feminar. singular. Quistorp kl. Schrift. Nr. 3. K. L. C. Röslin v. d. besondern weibl. Rechten. 2. B. 4. Mannh. 1775. 1779.

place, and it is only necessary here to observe that as a general rule laws in which men only are spoken of extend to women,<sup>m</sup> but that the converse does not hold.<sup>n</sup>

## 2. Age.

### § 121.

The age of a person has a great influence on his rights.<sup>o</sup> With respect to this subject all persons are either of age (*maiores*) or under age (*minores*), according as they have or not completed their twenty-fifth year.<sup>p</sup>

There are several degrees of minority. Boys who have not completed their fourteenth and girls who have not completed their twelfth year are *impuberes*,<sup>q</sup> and the period which precedes their age of puberty is termed *prima* or *pupillaris ætas*;<sup>r</sup> after the completion of this period persons are termed *puberes* (or *minores* in a more limited sense or *adulti*,<sup>s</sup> or in *secunda ætate* or *adolescentes*).<sup>t</sup> Children who have not completed their seventh year are called *infantes*, and afterwards, until they have attained their age of puberty, they are *infantia maiores*.<sup>u</sup> These last are again

<sup>m</sup> L. 62. de leg. III. (32.) L. 1. 84. 116. 122. 163. § 1. 172. 195. pr. 201. de V. S. (50. 16.).

<sup>n</sup> L. 45. pr. de leg. II. (31.) L. 81. pr. de leg. III. (32.). Hartleben med. Sp. 17. M. 3.

<sup>o</sup> C. L. Crell D. ius. ætatis (Diss. F. l. n. 4.). W. G. Ploucquet vom menschlichen Alter u. den davon abhängenden Rechten. Tüb. 1779. Gesterding Nachforsch. 2. B. Nr. 1. Schilling Instit. B. 2. § 35. Weiske Rechtslexikon B. 1. 213. Savigny System B. 3. § 106—111.

<sup>p</sup> L. 1. de minor. (4. 4.).

<sup>q</sup> L. 3. C. quando tutor. vel. curat. esse desin. (5. 60.) pr. I. quib. mod. tutel. finit. (1. 22.). A. W. Cramer de pubertatis termino ex disciplina Romanorum. Kil. 1804.

<sup>r</sup> L. 3. C. de præscr. 30 ann. (7. 39.) L. 8. § 3. C. de bon. quæ lib. (6. 61.). Some as for example Voet L. 2. T. 15. § 4. understand the expression *prima ætas* to mean minority, but see (tho unglossed) L. 30. C. de episcop. audient. (1. 4.) L. 10. C. de impub. et alior. substit. (6. 26.).

<sup>s</sup> L. 25. L. 28. pr. C. de adm. tut. (5. 37.).

<sup>t</sup> pr. I. quib. mod. tut. finit. (1. 22.). L. 3. § 11. L. 49. de minor. (4. 4.) L. 8. § 1. C. de bon. quæ lib. (6. 61.) Erroneous ideas on this point are entertained by Tigerström Dotalrecht. 1. B. 111—121.

<sup>u</sup> L. 1. § 2. de adm. tut. (26. 7.) L. 18. pr. § 4. C. de iure delib. (6. 30.).



divided into two classes, viz., *infantia* and *pubertati proximi*;<sup>\*</sup> the meaning of which is probably to be discovered by dividing the period between the completion of infancy and the attainment of puberty into two equal portions, and not by considering the moral capability of committing crime which is so different in different persons.<sup>†</sup>

Some laws require that men should have completed their eighteenth and women their fourteenth year,<sup>‡</sup> after which the period of *pubertas plena* commences; the preceding stage of puberty being called *pubertas minus plena*. As a general rule the period of old age (*senectus*) which affords an exemption from public services, begins after seventy years are completed.<sup>§</sup>

### 3. Health.

#### § 122.

With respect to their natural capacities persons are either sound or unsound. An unsoundness which is incurable constitutes a *vitium* and one which is curable a *morbus*, and the latter, if it renders the completion of a legal transaction impossible, is a *morbus soticus*. Unsoundness may be either of mind or body.

Unsoundness of mind may be evidenced either by mere weakness of intellect or by total absence of reason. Persons without any reason are termed *furiosi* or *mente capti seu dementes*,

See *contra* Unterholzner in Savigny Zeitschr. 1. B. Nr. 3. But see Heidelb. Jahrb. 1815. 670—683. Glück Pand. 30. Bd. 432—435.

<sup>\*</sup> § 10. I. de inutil. stip. (3. 19.). A. Moehl de minore aetate etc. Manhem. 1834. p. 10. 17. Savigny *ubi supra* § 107.

<sup>†</sup> § 10. I. de inutil. stip. (3. 20.) L. 5. § 2. ad L. Aquil. (9. 2.) L. 23. de furt. (47. 2.) L. 12. ad L. Corn. de sicar. (48. 8.) L. 209. de V. S. (50. 16.). Archiv für civilist. Praxis. 4. B. Nr. 13. See too Thibaut's System § 818. Nr. II. On account of § 18. I. de obl. quae ex. del. (4. 1.) L. 111. pr. de R. I. (50. 17.) Dirksen Vermischte Schriften B. 1. Nr. 8. is of a different opinion. Compare Gesterding Nachforsch. B. 2. p. 29—32.

<sup>‡</sup> §. 4. I. de adopt. (1. 11.) L. 40. § 1. eod. (1. 7.) L. 14. § 1. de aliment. legat. (34. 1.) Nov. 115. cap. 3. § 13. Dirksen Beiträge 289—291.

<sup>§</sup> § 13. I. de excus. (1. 25.) L. 2. pr. eod. (27. 1.) L. 3. de iure immun. (50. 6.) L. un. C. qui aetate (5. 68.) L. 10. C. de decurion. (10. 31.). The L. 3. C. qui aetat. vel prof. (10. 49.) is not opposed to this. Archiv für civ. Praxis. 8. B. Nr. 2. Glück Pand. 32. B. 45—47.

according as they are raving or not.<sup>b</sup> Persons afflicted with mere weakness of intellect are legally entitled to personal freedom unless they are placed under the care of a guardian, but persons afflicted with absence of reason cannot engage in any legal transactions except in their occasional<sup>c</sup> lucid intervals.<sup>d</sup>

Unsoundness of body is only so far important as it affects the power of procreation, which may be defective as well in men as in women (e.g. *arctitudo absoluta*). A man in whom this power is deficient is termed *spado*.<sup>e</sup> This word is however sometimes opposed to *castratus*, and then includes all cases of impotence not arising from castration and whether perpetual or temporary, and in the former case whether resulting from external accidents and injuries (*thlibiæ thlasie*) or disease or existing from birth.<sup>f</sup>

#### 4. Relationship.

##### § 123.

The legal doctrines respecting relationship are of extreme importance. Speaking generally, persons related to each other by blood are *cognati*.<sup>g</sup> Relations who have a common male ancestor are *agnati*;<sup>h</sup> if they have a common female ancestor they are, as opposed to the last, *cognati*, and if they have both a common male ancestor and a common female ancestor they are *agnati* as well as *cognati*.<sup>i</sup>

<sup>b</sup> L. 2. de inoff. (5. 2.) L. 25. C. de nupt. (5. 4.) L. 8. § 1. de tut. et cur. dat. (26. 5.) L. 6. de cur. fur. (27. 10.). Mühlenbruch Pand. 1. B. § 181. Savigny Zeitschr. B. 10. p. 266.

<sup>c</sup> L. 14. de off. praes. (1. 18.).

<sup>d</sup> § 1. I. quib. non est perm. (2. 12.) L. 17. eod. (28. 1.) L. 9. C. eod. (6. 22) L. 2. C. de contr. emt. (4. 38.) L. 6. C. de cur. fur. (5. 70.).

<sup>e</sup> Savigny System B. 3. § 110.

<sup>f</sup> L. 128. de V. S. (50. 16.) L. 6. § ult. L. 7. de aedil. edict. (21. 1.) L. 39. § ult. de iure dot. (23. 3.). Merill Obs. L. 1. c. 25. Kirchmaier op. de latinitat. vet. Ictor. Ed. Madihn p. 242—44. Brisson de V. S. s. v. *castratus*. The peculiarities of castration are extended to impotence in general by Mühlenbruch Pand. B. 1. § 180.

<sup>g</sup> pr. I. de grad. cogn. (3. 6.) L. 1. pr. L. 4. § 1. 2. de grad. et affin. (38. 10.). See generally Glück Pand. 23. Bd. § 1209. 1210.

<sup>h</sup> Puchta Cursus der Inst. 2. B. 278—281.

<sup>i</sup> pr. I. de legit. agn. succ. (3. 2.) pr. I. de SCTo Tert. (3. 3.) pr. I. de SCTo

## A. BLOOD RELATIONSHIP.

## § 124.

**Its sorts.**—Community of blood is requisite to true relationship. But by the Roman law there are cases in which persons not related to each other by blood are treated as if they were so related. When for example a man adopts an infant, the latter is, so long as this relationship continues, treated as an agnate of the former,<sup>k</sup> and in an analogous way a sort of spiritual relationship is held by Roman Catholics, though not by Protestants,<sup>l</sup> to result from baptism and confirmation (*cognatio spiritualis*).<sup>m</sup>

Relations are consequently partly *civil*, partly *natural*. Relationship by blood if it originates in the absence of a legal marriage is called *natural* (in a more limited sense), but if otherwise both *civil* and *natural*. In either case the relations may be agnates or cognates or both. But in the Roman law the words *agnatio* and *cognatio*, *naturalis* and *civilis*, have reference to those relationships which resulted from the old doctrines respecting the *familia*: and according to them neither cognates by marriage nor agnates without marriage are termed *agnati* or *cognati civiles*; but only agnates by marriage which are both *agnati* and *cognati*.<sup>n</sup> The general expression for agnates in this sense is *familia*, a term which is however also used with a narrower meaning, viz., to denote all those who are subjected to the same *patria potestas*.<sup>o</sup>

## § 125.

**Its degrees.**—A plurality of persons related by having a common

Orphit. (3. 4.) L. 4. § 2. L. 10. § 1. 2. 3. de grad. et affin. (38. 10.). Gaius L. 1. § 156. Ulp. Fr. Tit. XI. § 4. Every thing is referred to the notion of Potestas by P. F. Deiters de civili cognatione et familiari nexu ex iure Romano et Germanico. Bonn 1825.

<sup>k</sup> L. 4. § 2. l. c. L. 23. de adopt. (1. 7.) L. 2. § 3. de suis et legit. (38. 16.).

<sup>l</sup> Brouwer de iure connub. L. 2. c. 8.

<sup>m</sup> c. 1. C. 30. qu. 3. 4. cap. 1. 6. 7. X. de cognat. spirit. (4. 11.) cap. 1. 2. 3. eod. in 6. (4. 3.).

<sup>n</sup> L. 4. § 2. L. 10. § 4. de grad. et affin. (38. 10.) § 3. I. de legit. agnat. tutel. (1. 15.). Collat. Leg. Rom. et Mosaisc. Tit. 16. § 3. Püttmann interp. et observat. cap. 10.

<sup>o</sup> L. 195. de V. S. (50. 16.).

ancestor is called a stock, and the connection which results from a plurality of progenitors or issue is what is meant by degree of relationship.

An unbroken and continuous series of relations forms a line, and is ascending or descending according as the reckoning is made from the younger to the older or from the older to the younger respectively; relations are upon the same principle called ascendants or descendants. If several lines meet in one and the same person each of these lines is with respect to the other of them collateral (*linea obliqua*), and the persons in one line are related collaterally to those in the others.<sup>p</sup> The word line taken alone is used to denote a direct line (*linea recta*) as opposed to a collateral line (*linea obliqua*). Lines which consist of the same number of persons are called equal, and unequal if the number of persons in each is different. The relationship of a person to the brothers and sisters of his ancestor is denoted by the expression *respectus parentele*.<sup>q</sup> *Agnatio* may occur not only in the collateral,<sup>r</sup> but also in the direct line.<sup>s</sup>

§ 126.

**Half Blood, Whole Blood.**—Collateral relations who are not descendants of one and the same common pair of ancestors are related to each other in the half blood; and their relationship is *unilateral*. Brothers and sisters having only a common father are *consanguinei*, those with only a common mother are *uterini*.

Collateral relations who are descendants of one and the same common pair of ancestors are related to each other in the whole blood; and their relationship is *bilateral*. Brothers and sisters having both a common father and mother are related in the whole blood (*germani*).<sup>t</sup>

<sup>p</sup> L. 9. de grad. et affin. (38. 10.) pr. I. de grad. cognat. (3. 6.).

<sup>q</sup> § 1. 5. I. de nupt. (1. 10.). Cuiac. Obs. L. 9. c. 18. Dirksen Beiträge. Nr. 6.

<sup>r</sup> pr. I. de legit. agn. succ. (3. 2.) L. 10. § 6. de grad. et affin. (38. 10.).

<sup>s</sup> L. 11. C. de legit. her. (6. 58.) L. 5. C. de emanc. (8. 49.). Püttmann int. et obs. c. 10. See *contra* D'Arnaud conl. L. 1. c. 6.

<sup>t</sup> Epit. Gaii L. 2. T. 8. § 6. Collat. LL. Mosaic. Tit. 16. § 3. Theophili

Care must be taken to distinguish this full blood relationship of collateral relations from what is called *cognatio multiplex*, which arises when one person can trace his relationship to another by two, three or more lines (*cognati duplices, triplices, &c.*),<sup>1</sup> a circumstance which may be very important in cases of intestate succession.<sup>2</sup>

### § 127.

The computation of degrees, so far as regards ascendants and descendants is precisely the same both in the Roman and in the Canon law, viz., from parent to child one degree. The Roman law adopts the same rule regarding collaterals.<sup>3</sup> The Canon law however reckons only once in respect of all who are sprung from the same person, and accordingly collaterals are by this law related to each other in the same degree in which they are or (in case the number of degrees be unequal) the most remote of them is related to their common ancestor.<sup>4</sup>

## B. AFFINITY.

### § 128.

One kind of relationship, at least according to the Canon law,

paraphras. L. 3. T. 2. § 1. L. 27. C. de inoff. test. (3. 28.) L. 21. C. de exous. tutor. (5. 62.). Rutgers var. lect. L. 1. c. 9. Fritz in Linde Zeitschrift B. 15. Nr. 2.

<sup>1</sup> Koch successio ab intest. auct. III. H. J. Klüpfel über die Vielfachheit der Verwandtschaft. Stutt. 1793. J. F. C. Weisser Berechn. d. Verwandtschaftsgrade. Tübing. 1781. § 21 *et seq.* Hugo civ. Mag. 4. B. Nr. 7. & 16. Fritz *loc. cit.* 31. Puchta Cursus der Instit. B. 2. p. 282. 283.

<sup>2</sup> See Thib. Syst. § 855.

<sup>3</sup> See as to the computation of degrees H. de Cocceii de computat. grad. cognitionis. Heidelb. 1672. Fref. 1712. Weisser *ubi supra*. Nettelblatt syst. doctrin. propædæut. § 322—346. For the history of the Canon law computation see I. H. Boehmer I. E. P. L. 4. T. 14. Glück Pand. 23. B. § 1209. 1210. E. A. T. Laspeyres D. canonicae computationis et nuptiarum propter sanguinis propinquitatem ab ecclesia Christiana prohibitarum sistens Historiam. Berlin. 1825. and for different modes of making a table: Gothofredi corp. grammaticor. p. 1858. Hommel oblectam. iur. feud. Obs. 15. § 2.

<sup>4</sup> § 7. I. de grad. cognat. (3. 6.) L. 10. § 9. 13. cod. (38. 10.).

<sup>5</sup> c. 2. C. 35. q. 5. cap. ult. X. de consanguin. et affin. (4. 14.). Comp. with I. C. Koch de nova in comput. grad. canonica inventa regula. Giess. 1765. (op. iur. canon. n. 4.).

is known as affinity.<sup>b</sup> By *affinitas* the Romans understood the relationship which in consequence of marriage is deemed by law to exist between one of two married persons and the relations by blood of the other.<sup>c</sup> The Canon law adopts most literally the principle of unity of body said in Scripture<sup>d</sup> to exist between cohabiting persons,<sup>e</sup> and, although there be no issue, makes cohabitation (at least for the purpose of forbidding marriages) the ground of affinity; consequently by the Canon law a valid marriage is not requisite to the existence or continuance of that relationship.<sup>f</sup> Many Protestants on the other hand hold that with the dissolution of marriage all affinity ceases; but this can be true only of Roman affinity (which is not affected by the Canon law),<sup>g</sup> and of those cases in which a legal marriage has been contracted but has not been followed by cohabitation.<sup>h</sup>

Although the relations of a married couple are not regarded as having any affinity *inter se*,<sup>i</sup> still the married couple are called as between themselves *affines*.<sup>k</sup>

### § 129.

There are three sorts of affinity according to the Canon law. The first is that already described: the second, the relation-

<sup>b</sup> W. A. Lauterbach D. I. II. de singulari affn. iure. Otto de vetit. affn. nupt. (in Oelrichs Thes. nov. V. 3. p. 2.). C. H. Gmelin de vero concept. affinitat. eiusque grad. et gener. Tubing. 1801. Klenze in Savigny Zeitschr. B. 6. Nr. 1. W. Sell im Archiv f. civ. Prax. B. 22. Nr. 9.

<sup>c</sup> L. 4. § 3. 8. 10. de grad. et affn. (38. 10.). Gmelin l. c. § 2. 10. The laws which forbid marriages on the ground of affinity only, become applicable after a dissolution of marriage. § 6. 7. I. de nupt. (1. 10.).

<sup>d</sup> 1. Cor. 6. v. 16. Matth. 19. v. 5.

<sup>e</sup> cap. 5. X. de bigam. non. ord. (1. 21.) c. 18. C. 27. qu. 2. cap. 3. X. de spons. (4. 1.). Gmelin l. c. § 7. 12.

<sup>f</sup> c. 7. 14. 15. 21. C. 35. q. 2. cap. 10. X. de eo qui cogn. cons. uxor. (4. 13.). Glück Pand. 23. B. § 1211.

<sup>g</sup> For the principle mere marriage gives rise to affinity is not repudiated but rather recognised by the Canon law. cap. 3. X. de sponsal. (4. 1.).

<sup>h</sup> Gmelin l. c. § 11.

<sup>i</sup> L. 4. § 3. de grad. et affn. (38. 10.) cap. 5. X. de consanguin. (4. 14.). Gmelin l. c. § 9.

<sup>k</sup> L. 38. § 1 de usur. (22. 1.) L. 15. C. de don. ante nupt. (5. 3.) L. 5. C. de her. inst. (6. 24.). Schilling Instit. B. 2. § 43. Zus. 3.

ship between an *affinis primi generis* and the new husband of his *affinis*; the third the relationship between an *affinis secundi generis* with the new husband of his *affinis* of the second sort.<sup>1</sup> The relationship between *affines* is, but improperly, reckoned by degrees and lines according to the rule that each one of two cohabiting persons is related by affinity to a relation by blood of the other in the same degree as such relation is related to that other;<sup>m</sup> the degrees being computed according to the principle of the Roman or Canon law as the case may be.

### 5. Moral Character.

#### A. INFAMIA.

##### § 130.

Moral character also gives rise, in certain cases, though not generally, to important legal consequences, but only when grossly immoral conduct in general can be imputed. The feeling of aversion entertained by others for such a person is, properly speaking, what is denoted by *infamia*; but this word is often used to denote the immorality which gives rise to such feeling.<sup>n</sup>

##### § 131.

**Infamia juris et facti.**—Whether there be any Infamy (in the sense of aversion) or not, must in every case depend upon the moral notions of the judge. But there are certain circumstances

<sup>1</sup> c. ult. C. 35. q. 2. 3. cap. 8. X. de consangu. (4. 14.). Gmelin l. c. § 19. I. H. Boehmer l. c. § 33. Glück Erl. d. Pand. 23. B. § 1214.

<sup>m</sup> L. 4. § 5. L. 10. pr. h. t. (38. 10.) c. 12. C. 35. q. 2. 3. Gmelin l. c. § 8. 23—26.

<sup>n</sup> Compare generally C. Thomasii D. de existimat. fama et infam. extra rem-publ. Hal. 1734. H. W. v. Günderode über die bürgerl. Ehre bei den Deutschen (in his works vol. II. p. 187). C. G. Hübner über Ehre und Ehrlosigkeit. Leipz. 1800. See too the Allg. Lit. Z. 1801. Nr. 98. C. Grolman über Ehre und guten Namen, in his Magaz. für Philosophie. 1. B. Nr. 1. Hugo civ. Mag. 3. B. Nr. 8. G. C. Burchardi de infamia ex disciplina Romanorum. Kil. 1819. A. M. I. Molitor de minuta existimatione. Lovanii 1824. G. L. T. Marezoll über die bürgerliche Ehre. Giess. 1824. J. F. Kierulff Theorie des Civilrechts B. 1. 95. Savigny System B. 2. § 76—83. & Beilage VII. Weiske Rechtslexikon B. 3. 607. Sinentia Civilrecht B. 1. § 14.

from which the law itself declares that a feeling of aversion shall arise. Infamy thus presumed is *infamia juris*, that on the other hand which results in the mind of the judge from his own consideration of the circumstances is *infamia facti*.<sup>o</sup>

### § 132.

**Mediate—Immediate.**—If the existence and quality of a transaction, by engaging in which infamy follows by virtue of some law, are manifest, the infamy attaches at the moment that transaction is commenced; but in other cases it does not by the Roman law attach until after a formal legal judgment has been pronounced to that effect.<sup>p</sup> *Infamia juris* is accordingly divided into *immediata* and *mediata*, as the transaction is of the former or the latter kind respectively.<sup>q</sup>

### § 133.

The details of the law relating to mediate and immediate infamy are referred to in their proper places in the *System*; they also require notice in a treatise on criminal law.<sup>r</sup> In this place it is, however, only necessary to observe, that according to modern German law infamy is not contracted in the absence of a formal judgment,<sup>s</sup> and only then in case the judgment expressly states that it shall attach, or in case the punishment is one which

<sup>o</sup> Several persons deny the existence of any *infamia facti*, see Donell comm. L. 18. c. 6. C. G. Einert exerc. qua praeter unam mediatam iuris infamiam nullam existere famae speciem defenditur. Lips. 1777. Burchardi l. c. Savigny *loc. cit.* § 78. and in support of their view they cite L. 42. de V. S. (50. 16.) L. 20. de his qui not. infam. (3. 2.) L. 3. pr. de testib. (22. 5.) L. 2. pr. de obsequ. par. (37. 15.) L. 25. C. ad L. Iul. de adult. (9. 9.) L. 13. C. ex quib. caus. infam. irrog. (2. 12.) L. 27. C. de inoff. test. (3. 28.) L. 2. C. de dignitat. (12. 1.). Emminghaus ad Cocceii L. 3. T. 2. qu. 9. Marezoll *loc. cit.* 290—400.

<sup>p</sup> L. 1. L. 4. § 4. h. t. (3. 2.). See more fully Mühlenbruch Pand. B. 1. § 189. Nr. 9.

<sup>q</sup> G. L. Boehmer de querel. inoff. donat. frat. § 6. (in Elect. T. 1. Nr. 9.). This division is opposed by Savigny *System* B. 2. § 78. and for the foundations of both see Vangerow *Leitfaden* § 47.

<sup>r</sup> See generally Glück Pand. B. 5. § 378—80. Rudorff das gemeine Civilrecht. Berlin 1843. § 32. Anm. 1.

<sup>s</sup> Danz Handb. d. D. Priv. R. § 301. Hübner p. 93.



according to German ideas renders a person infamous.<sup>1</sup> What punishments have this result is not settled by writers on criminal law,<sup>2</sup> and never will be until they wholly abandon the entire doctrine, which is opposed as much to law<sup>3</sup> as it obviously is to common sense.<sup>4</sup>

### § 134.

**Consequences of infamy.**—So far as regards the doctrines of private law the consequences of infamy (which are noticed in the proper places<sup>2</sup>) cease as soon as the infamy is extinguished. *Infamia facti* ceases to exist as soon as a change of moral conduct can be proved, and *infamia juris* ends with the period for which it is decreed to endure, or by a *restitutio famæ* proceeding from some superior power.<sup>3</sup>

With respect to public law, *infamia*, whether *juris* or *facti*, renders a person incapable of any political rights.<sup>b</sup>

### B. LEVIS NOTÆ MACULA.

#### § 135.

Under the name of *levis notæ macula* the Romans designate something similar to *infamia*,<sup>c</sup> and particularly in this respect that certain persons cannot take by will to the exclusion of the brothers and sisters of the testator. Such persons are under a *levis notæ macula*,<sup>d</sup> but who they are the laws nowhere inform us. Illegi-

<sup>1</sup> G. L. Boehmer l. c. § 7.

<sup>2</sup> Quistorp Grunds. d. peinl. R. 1. Thl. § 77. Note 1. Müller ad Leyser Obs. 172.

<sup>3</sup> L. 22. h. t. (3. 2.). Kleinschrod Grundw. d. p. R. 3. Thl. § 83.

<sup>4</sup> Hübner 113. 137.

<sup>a</sup> For the doctrines relating to the *actio de dolo* see Thib. Syst. § 617.; to the *querela inofficiosi testamenti* *ibid.* § 988. For the Canon law as to burials, and the German law as to guilds, see Rudorff *loc. cit.* Anm. 2.

<sup>b</sup> A. Kaestner de fama, huius amissione et restitutione. Lips. 1730. M. H. Griebner de iure principum imperii restituendi famam (in op. T. 1.). Schnaubert Beitr. 1. Thl. Nr. 9.

<sup>c</sup> L. 2. 12. C. de dignit. (12. 1.) L. 8. C. de Decurion. (10. 31.) L. un. C. de infam. (10. 57.) L. 3. C. de re milit. (12. 36.). Savigny *loc. cit.* § 79—82.

<sup>d</sup> Heineccius de lev. not. mac. (in syllog. opusc. n. 7.).

<sup>e</sup> L. 27. C. de inoff. test. (3. 28.). Heineccius præfat. ad opusc. var. syllog. G. L. Boehmer l. c. § 13. Marezoll *loc. cit.* pp. 103—105. 246—259. 282—289.

timate children, however, were certainly not amongst them, for no stigma was attached to bastards as such;<sup>e</sup> and persons who carry on disgusting trades do not seem to have been included,<sup>f</sup> although such trades are the objects of special laws.<sup>g</sup>

### § 136.

In former times there was a considerable number of persons to whom, according to the prejudices of the Germans some stigma was attached, and who were consequently not capable of becoming members of Guilds or Companies; this number is, however, now reduced to knackers (*abdecker*) and illegitimate children.<sup>h</sup> To these people attaches the German *levis notæ macula*, but if all confusion of ideas is to be avoided, neither this expression nor the word *infamia* should be made use of; for the person who in this sense is disreputable, is not one to whom the Roman *levis notæ macula*, *infamia juris* or *infamia facti* would attach.<sup>i</sup> The Prince can remove this German disgrace, and the removal is, in the case of illegitimate children, called *legitimatio minus plena*.

<sup>e</sup> Püttmann de querel. inoff. test. fratr. atque soror. contra spurios haud competent. Lips. 1772.

<sup>f</sup> Heineccius Diss. cit. § 32.

<sup>g</sup> L. 6. C. de dignit. (12. 1.).

<sup>h</sup> Danz *loc. cit.* § 310.

<sup>i</sup> Stein v. pflichtw. Testam. § 26. Savigny *loc. cit.* § 83.

## CHAPTER III.

## OF THE OBJECTS OF RIGHTS AND DUTIES.

## DIVISION I. OF THE MOST IMPORTANT KINDS OF TRANSACTIONS.

## I.—IN GENERAL.

## § 137.

**Transaction. Object of rights.**—The object of rights and duties has next to be considered. Their object is neither a person nor a thing, and can only be a transaction or event (*Handlung*).<sup>k</sup> A thing can only be looked upon as the object of a transaction.

## § 138.

A transaction in order to be the object of legal rights and duties must be possible,<sup>l</sup> and must also as a general rule affect others and not be a mere internal act or state. There are, however, cases in which notice is taken of an internal fact or event accompanying an external transaction, but it may be laid down as a universal rule that a fact or event wholly internal must be treated juridically as non-existing.<sup>m</sup>

## § 139.

**Permitted, Unpermitted.**—All transactions are with reference to law *permitted* or *not permitted*. The first require no further remarks; but the last are capable of being sub-divided into the important sections of accidental, free but not imputable, negligent and fraudulent.

<sup>k</sup> Compare Savigny System B. 3. § 106. Zirkler in Weiske Rechtslexikon B. 5. p. 105—149.

<sup>l</sup> L. 185. de R. I. (50. 17.).

<sup>m</sup> § 8. I. de obl. quae ex delict. (4. 1.) compared with L. 3. § 3. ad Sct. Maced. (14. 6.).

## II.—ESPECIALLY OF UNPERMITTED TRANSACTIONS.

## § 140.

A transaction or event is accidental (*casualis*) when it results from the operation of natural causes over which the human will has no control. Such a transaction is not to be considered as that of any person.<sup>n</sup>

A free but not imputable transaction is one which a person might have prevented, but of the illegality of which he could not become aware.<sup>o</sup>

Negligence (*culpa, negligentia*) is where an illegal act is performed neither with the intention of disobeying any law nor with a morally wrong intention, but under such circumstances that a knowledge of the illegality of the act might have been attained.

Fraud (*dolus*)<sup>p</sup> is where an act is committed by a person who having knowledge of a law disobeys it wilfully and with a morally wrong intention. Fraud is also sometimes called *culpa*,<sup>q</sup> which taken in such extended sense is then divided into *culpa versutia* and *culpa ignorantia*.<sup>r</sup>

## § 141.

**Culpa.**—Negligence may be shown in many ways. A person may either commit some positive and injurious act which he ought not to have committed (*culpa* in its narrow sense), or he may leave undone wholly or in part that which he ought to have

<sup>n</sup> L. ult. in fin. de administr. tutor. (26. 7.) L. 5. § 2. ad leg. Aquil. (9. 2.). Thibaut Versuche 2. B. Nr. 8. See post § 166.

<sup>o</sup> For example L. 25. § 2. ad Sct. Trebell. (36. 1.). See too § 166.

<sup>p</sup> L. 7. pr. depos. (16. 3.) L. 8. § 10. mandati (17. 1.) L. 14. § 2. de custodia (48. 3.) L. 7. § 3. 7. de dolo (4. 3.). For the different opinions respecting *dolus* and *culpa* see Grolman Bibl. für peñl. R. 1. Th. 1. St. Nr. 1. 3. St. Nr. 3. 2. B. 1. St. Nr. 5. Klein Archiv 1. B. 2. St. Nr. 10. 2. B. 2. St. p. 216. Feuerbach Revision 1. Th. 6. Cap. E. v. Löhr Theorie der Culpa. Giess. 1806. § 5—7. F. Schöman vom Schadensersatz. Giess. 1806. 2. B. 3—10. Löhr Beitr. zu der Theorie der Culpa. 34—48. J. C. Hasse die Culpa des Röm. Rechts. Kiel 1815. 2te Ausg. Bonn. 1838. § 17—23. Zirkler in Weiske Rechtslexikon B. 3. p. 83—133. 466—505.

<sup>q</sup> L. 5. § 1. ad L. Aquil. (9. 2.) L. 3. depos. (16. 3.) L. 91. § 3. de V. O. (45. 1.). Löhr Theorie § 1. 2.

<sup>r</sup> Avezan contr. Lib. c. 26. (Meerman Th. T. 4.). Wehrn § 3. See the next note.

done (*omissio diligentia*). If in the latter case the omission consists in not having prevented injury there is what is called *omissio custodia*.<sup>5</sup> *Custodia* in this sense was in point of fact recognised by the Romans,<sup>6</sup> and they were not entirely ignorant of the above mentioned distinction between *culpa* and *diligentia*;<sup>7</sup> but as a rule the word *culpa* was taken in a general sense and included *culpa* in the narrow sense above explained as well as the opposite of *custodia* and *diligentia*; and this last word was used to express the general notion of a duty to do or not to do.<sup>8</sup>

### § 142.

The diligence which a person can be called upon to exercise is either the utmost which persons in general can exercise (*diligentia in abstracto*, absolute diligence), or such as a person usually exercises in conducting his own affairs (*diligentia in concreto*, relative diligence).<sup>9</sup> The opposites of these are con-

\* For the doctrines relating to *culpa* see H. Cocceii de doli, culpa et negligentia praestat. in quolibet negotio. Heidelb. 1672. C. G. Wehrn doctr. iur. explicatr. princip. et caussar. damni. Lips. 1795. 8. cap. 3. 4. the works cited in § 140. Note p. & J. C. Gensler exerc. ad doctr. de culpa. Jen. 1813.

<sup>1</sup> L. 13. §. 1. de pign. act. (13. 7.) L. 41. locat. (19. 2.) L. 31. pr. de act. emt. vend. (19. 1.). Lauterbach coll. L. 13. T. 6. § 37. Waechtler opusc. p. 201—203. Of a somewhat different opinion are Löhr Theorie § 12. Schöman Handbuch 2. B. 263—284. Löhr Beiträge 63—202. Hasse loc. cit. § 88. & p. 408.

<sup>2</sup> Compare for example ad L. Aquil. (9. 2.), where negative acts alone are required and where only *culpa* is mentioned, with the laws relating to transactions in which positive diligence is required; e. g. L. 24. C. de usur. (4. 32.) L. 25. § 16. famil. hercisc. (10. 2.) L. 17. pr. de iure dot. (23. 3.) L. 1. pr. de tutel. et rat. distr. (27. 3.).

<sup>3</sup> § ult. I. de societate (3. 25.) L. 52. § 11. L. 72. eod. (17. 2.) L. 18. pr. commod. (13. 6.) L. 39. § 7. L. 57. pr. de admin. tut. (26. 7.) L. 23. C. eod. (6. 37.) L. 7. C. arbitr. tutel. (5. 51.) L. 11. C. mandat. (4. 35.) L. 68. pr. de contr. emt. (18. 1.) L. 6. de administr. rer. civ. (50. 8.) L. 36. de act. e. v. (19. 1.) L. 25. § 7. locati (19. 2.) L. 3. de peric. et comm. r. v. (18. 6.) L. 1. § 4. de O. et A. (44. 7.) § 3. I. de emt. (3. 23.) L. 66. pr. solut. matr. (24. 3.) L. 91. pr. de V. O. (45. 1.). Hasse loc. cit. § 1—62.

<sup>7</sup> There are four cases in which this is required; see § ult. I. de societate. (3. 25.) L. 72. pro soc. (17. 2.) L. 25. § 16. fam. erc. (12. 2.) L. 17. pr. de iur. dot. (23. 3.) L. 1. pr. de tut. et ration. (27. 3.). Hasse loc. cit. § 69—75. Unterholzer Schuldverhältnisse B. 1. § 117. Rosshirt Zeitschrift B. 2. 49.

<sup>8</sup> W. H. Brückner de culpa quae conerctive talis dicitur. Ien. 1693.

sequently *culpa in abstracto* and *in concreto*. In cases of doubt the words *culpa* and *diligentia* are to be taken in the sense of absolute.<sup>a</sup>

### § 143.

**Degrees of culpa.**—If negligence in its widest sense be considered with reference to the pains which must be taken to avoid it, it may, of whatever kind, be said to be of various degrees, and so consequently may also *custodia* and *diligentia*.<sup>b</sup> By the Romans, however, only absolute *culpa* has degrees attributed to it, and these are two, viz.—

1. *Culpa lata* or the want of that diligence which might be expected even of a person of less than ordinary care and prudence; and

2. *Culpa levis*<sup>c</sup> or the want of that diligence which is taken by careful prudent persons.

The word *culpa* alone denotes both of these, and there is no *culpa levissima* as opposed to *culpa levis*, but the latter as understood by the Romans rather includes the former as understood by the moderns.<sup>d</sup> It is very easy however to imagine a higher

D. Runge legale fundament. culpae in abstr. et concret. Goetting 1751. Hasse *loc. cit.* § 40.

<sup>a</sup> L. 18. pr. commod. (13. 6.) L. 13. § 1. L. 14. de pign. act. (13. 7.) L. 31. ad Leg. Aquil. (9. 2.).

<sup>b</sup> § 3. 4. I. quib. mod. re (3. 14.) L. 1. § 8. depos. (16. 3.) L. 1. § 4. 5. de O. et A. (44. 7.).

<sup>c</sup> The expression occurs only in L. 39. § 6. de adm. et peric. (26. 7.) L. 47. § 5. de legat. I. (30.) L. 20. C. de neg. gest. (2. 19.) L. 7. arbitr. tut. (5. 51.) L. 54. § 2. de adq. rer. dom. (41. 1.).

<sup>d</sup> This theory first defended by Donellus comm. L. 16. c. 7. is proved on four different grounds in the following laws, viz. ; a) L. 36. de act. E. V. (19. 1.) § 5. I. de locat. cond. (3. 24.) L. 5. § 5. commod. (13. 6.) L. 25. § 7. locat. (19. 2.) compared with L. 23. de R. I. (50. 17.) L. 1. § 35. deposit. (16. 3.) L. 5. § ult. L. 18. pr. commodat. (13. 6.): further b) § ult. I. quib. mod. re contr. obl. (3. 14.) L. 2. § 1. de peric. et comm. r. v. (18. 6.) L. 28. C. locat. (4. 65.) L. 13. § 1. de pignor. act. (13. 7.) L. 19. C. de pignor. (8. 14.); again c) L. 7. C. arbitr. tutel. (5. 51.) L. 22. § 3. ad SCt. Trebell. (36. 1.) L. 20. C. de negot. gest. (2. 19.); and lastly d) L. 23. de R. I. (50. 17.) L. 108. § 12. de legat. I. (30.) L. 17. § 2. de praeser. verb. (19. 5.) L. 10. § 1. commod. (13. 6.). Compare too Löhr Theorie der Culpa, and his Beiträge, 55—162., especially Hasse's work as well as his edition of a paper by Le Brun on *culpa* in

degree of diligence than that which a person exercises in his own affairs, and such greater diligence is, when opposed to *culpa*, often denoted by the term *diligentia* alone.<sup>e</sup>

### § 144.

**Consequences of *culpa*.**—The doctrines respecting the legal consequences of fraud and negligence rest on the following principles,<sup>f</sup> which, however, are not here accompanied by the qualifications stated in other parts of the *System*, and which must be attended to in any particular case.

I. Independently of any contract, a person is bound to use the greatest diligence; but he is answerable only for positive acts, of themselves unpermitted, and he is not bound to positive *diligentia* or *custodia*, unless by virtue of some obligation arising from his own previous positive acts.<sup>g</sup> A person who in good faith uses that

Savigny Zeitschrift 4. B. Nr. 5. Seuffert Erört. einz. Lehren Nr. 15. R. F. G. van Zoelen de principiis quibus uti videntur Icti in constituenda doctrina de doli et culpae praestatione. Lugd. Bat. 1824. p. 124—267. F. Hänel vom Schadenersatz. Leipz. 1823. See *contra* Schöman Handbuch 1. B. 16—36. 2. B. 229—262. Majer de culpa, eiusque speciebus et gradibus. Tub. 1807. Gensler exercit. cit. and his Beitr. zu d. Lehre v. der Diligenz und Culpa. Heidelb. 1819 (1827). Peculiar views are entertained by C. F. Elvers de culpa. Goett. 1822. P. L. Kritz über die culpa. Leipz. 1823. For the doctrines of the German law relating to *culpa* see R. Maurenbrecher iuris germanici de culpa doctrina. Düsseldorf. 1827.

\* L. 2. § 1. L. 3. de peric. et comm. r. v. (18. 6.). Thus are also to be understood L. 5. § 2. commod. (13. 6.) compared with L. 5. § 15. eod.: further L. 47. § 5. de leg. I. (30.) compared with L. 22. § 3. ad SCt. Treb. (36. 1.). lastly L. 23. de R. I. (50. 17.) compared with L. 25. § 16. fam. herc. (10. 2.). See the essay by HASSE *passim* compared with Heidelb. Jahrb. 1815. p. 947—950.

<sup>f</sup> See generally, besides Pufendorf, Wehrn und Cocceii l. c., Prousteau recit. ad L. 23. de R. I. (Meerman Th. T. 3.). C. Thomasius de usu pract. doct. difficill. iur. R. de culp. praest. in contr. Hal. 1705. B. H. Reinold D. ad L. 23. de R. I. (opusc. p. 303 &c.). C. Waechtler comm. ad L. 5. § 2. comm. et L. 23. de R. I. Viteb. 1680. (in his opusc. rar. ed. Trotz. Trai. ad R. 1733.) and the already cited works of Löhr, Schöman and Majer.

<sup>g</sup> L. 13. § 2. de usufr. (7. 1.) L. 57. locat. (19. 2.) L. 8. pr. L. 27. § 9. L. 28. § 1. ad L. Aquil. (9. 2.). Vinnii quaest. scl. L. 1. c. 33. Voet L. 9. T. 2. § 3. Cocceii eod. qu. 5. and Wernher lect. c. ib. § 5, are both to be so understood.

which in fact belongs to another, as if it were his own, is not answerable for any loss or damage.<sup>b</sup>

II. If the parties be in some conventional relation two cases may occur, viz. :

1. Something may be agreed upon touching the diligence to be used, and then the terms of such a stipulation must be abided by.<sup>i</sup> Any agreement however by which future fraud or gross negligence is permitted is invalid, but a release of all rights of action which may have arisen from past fraud, is valid,<sup>k</sup> although the releasor be at the time ignorant of the existence of such fraud, but of course, not if he is induced by new fraud to give such release.<sup>l</sup>

2. If no agreement be made touching the diligence to be used, then it is a rule, that he who derives no benefit is only answerable for *dolus* and *culpa lata*, whether damage accrues from acts omitted or committed ;<sup>m</sup> but he who solely or together with the other derives a benefit is answerable for *culpa levis* in the sense of the Romans and must exercise the greatest diligence.<sup>n</sup> A person making a free gift and all like him (as for example, those who exercise an *ars liberalis*) are consequently only answerable for *culpa lata*.<sup>o</sup> To this there are the following exceptions—

a. He who is under an *obligatio faciendi* is bound to use the greatest diligence.<sup>p</sup>

<sup>b</sup> L. 25. § 11. L. 31. § 3. de her. pet. (5. 3.).

<sup>i</sup> L. 11. § 1. de act. e. v. (19. 1.) L. 1. § 10. deposit. (16. 3.).

<sup>k</sup> L. 27. § 3. 4. de pact. (2. 14.) L. 6. § ult. de act. e. v. (19. 1.) L. 17. pr. commod. (13. 6.) L. 36. de V. O. (45. 1.) L. 23. de R. I. (15. 17.). See *contra* Leyser Sp. 516. but see Müller ad Leyser Obs. 858.

<sup>l</sup> Glück Pand. B. 5. § 370. and Günther princ. iur. R. § 340. because of L. 6. § ult. L. 11. § 15. de act. e. v. (19. 1.) L. 14. § 9. de aedil. edict. (21. 1.) L. 69. § 5. de evict. (21. 2.) are of a different opinion. But they confound the merely innominate contract respecting damages with the nominate contract respecting *dolus*.

<sup>m</sup> See Thib. Syst. § 553. Note q. with respect to the above position.

<sup>n</sup> L. 5. § 2. L. 10. § 1. commod. (13. 6.) L. 31. in fin. locat. (19. 2.) L. 17. § 2. praeser. verb. (19. 5.) L. 108. § 12. de leg. I. (30.) L. 23. de R. I. (50. 17.) L. 61. § 6. de furt. (47. 2.) § ult. I. quib. mod. re contr. oblig. (3. 14.). See too Thib. Syst. § 553. Note q.

<sup>o</sup> L. 1. § 1. si mensor. fals. mod. (11. 6.) L. 18. § 3. de donat. (39. 5.) L. 41. § 1. de re iudic. (42. 1.).

<sup>p</sup> L. 137. § 3. de V. O. (45. 1.) L. 189. de V. S. (50. 16.).



b. So is he who, unasked, intermeddles with what does not concern him; and this whether he takes the place of a better man or not.<sup>9</sup>

c. On the other hand in *stricti juris negotiis* a person is only answerable for what he does in direct opposition to his duty,<sup>1</sup> and, as against a person to whom delay can be imputed, only for *culpa lata*.<sup>2</sup>

III. That care which a person takes in his own affairs is only sufficient where the law is express to that effect. In this place all that can be said is, that as a rule, where a person conducts the affairs of others along with his own, and the two are so mixed up together as to be inseparable, he is only answerable for want of such care as he takes of his own affairs,<sup>3</sup> on the ground, no doubt, that otherwise he would be compelled to exercise the greatest diligence in them.<sup>4</sup>

IV. He who is only bound to take such care as he takes of his own affairs, is nevertheless liable for absolute *culpa lata* (*culpa lata in abstracto*).<sup>5</sup> So again, he who is only bound to a little absolute diligence must use that diligence which he commonly exercises in his own affairs (*diligentia in concreto*).<sup>6</sup>

V. If a person bound by contract to take care of the property of another cannot protect both that and his own property from injury he must sacrifice the latter rather than the former.<sup>7</sup> Hence

<sup>9</sup> L. 1. § 35. depos. (16. 3.) §. 1. I. de obl. quae quas. ex contr. (3. 27.) L. 6. § ult. de negot. gest. (3. 5.). Glück Pand. 5. B. 361. 362. Löhr Theorie 44. Note 1. Hasse § 99. & p. 413. 414.

<sup>1</sup> L. 91. pr. de V. O. (45. 1.).

<sup>2</sup> Ante § 97 note x. and L. 8. § 3. L. 9. § 5. de reb. auct. iud. (42. 5.). Löhr Theorie 189. 190.

<sup>3</sup> L. 18. pr. commod. (13. 6.) L. 52. § 1. 2. 3. 11. pro. soc. (17. 2.) L. 3. C. de negot. gest. (2. 19.) L. ult. C. de pact. (5. 14.) L. 25. § 16. fam. here. (10. 2.) L. 41. de R. C. (12. 1.) L. 40. de negot. gest. (3. 5.) Vinnii qu. sel. L. 1. c. 52. Compare also Löhr Theorie 166—171. Schöman Handb. 1. B. 309—314. 329—336. See contra Kritz 179—196.

<sup>4</sup> Heidelb. Jahrb. 953. 954. Savigny Zeitschr. 4. B. 216. 217. 230—234. is of a different opinion.

<sup>5</sup> L. 29. pr. L. 59. § 1. mandat. (17. 1.) L. 24. § 5. solut. matr. (24. 3.).

<sup>6</sup> L. 32. depos. (16. 3.) L. 22. § 3. ad SCt. Treb. (36. 1.) Löhr Theorie § 7. Hasse loc. cit. § 63. 65—67.

<sup>7</sup> L. 5. § 4. commod. (13. 6.) L. 32. depos. (16. 13.). Gesterding alte und neue Irrthümer. 433—437.

the rule <sup>a</sup> that a person who under such circumstances preserves his own property must, in cases of doubt, be presumed to have been able to preserve the other.<sup>b</sup>

VI. He who on the one hand gains more than he need, but on the other is the cause of damage for which he is answerable, can set the gain off against the loss. But where it is the duty of a person to make a profit and not to suffer loss, he cannot of course be allowed to set off one against the other.<sup>c</sup>

VII. As a rule, even sometimes where the question is one of punishment, (especially of infamy,) *dolus* includes *culpa lata*.<sup>d</sup>

VIII. As a rule, and in all cases in which there is a passive translation of actions (§ 71), heirs are, unless specially favoured,<sup>e</sup> answerable for the misconduct of those to whom they succeed.<sup>f</sup>

# § 145.

**Evidence of culpa.**—In considering the evidence of negligence the following principles must be borne in mind.

1. A person proved to have engaged in an external and unpermitted transaction must himself show absence of negligence.<sup>g</sup>

2. Where there is no proof of a person having so engaged two cases may occur; namely—

A. He may be already in such a position as to be called upon to prove an accident,<sup>h</sup> and if so, then, whether he be plaintiff or defendant, and if the latter, whether he be charged with

<sup>a</sup> In accordance with cap. 2. X. deposit. (3. 16).

<sup>b</sup> Compare Donellus L. 16. c. 7. Wehrn § 13. Löhr Theorie 26—29. Schöman Handb. 1. B. 354. 355. Glück Pand. 13. Bd. 438—442. Gensler p. 24—29.

<sup>c</sup> L. 11. de neg. gest. (3. 5.) L. 23. L. 25. L. 26. pro soc. (17. 2.). For other views see Wehrn § 21.

<sup>d</sup> L. 5. § 2. commod. (13. 6.) L. 32. depos. (16. 3.) L. 226. de V. S. (50. 16.) L. 23. de R. I. (50. 17.) L. 11. § 4. de his qui not. infam. (3. 2.) L. 1. § 2. si is qui testam. liber. (47. 4.) L. 1. § 5. de O. et A. (44. 7.). Several persons think otherwise, see Höpfner Comm. § 756, Note 4. See Thib. Syst. § 835.

<sup>e</sup> As the heirs of Magistrates and Guardians, L. 4. de magistr. conv. (27. 8.) L. 1. C. de hered. tut. (5. 54.).

<sup>f</sup> L. 35. 36. pro socio (17. 2.) arg. L. 2. § 2. de V. O. (45. 1.).

<sup>g</sup> For then *dolus* would be presumed, see Thib. Syst. § 375. near the end.

<sup>h</sup> Thib. Syst. § 407. near the end.

negligence or not, he must show that he was guilty of no negligence.<sup>1</sup>

B. In other cases evidence of negligence must be given by him who charges another therewith.<sup>2</sup>

## *DIVISION II. OF THE OBJECTS OF TRANSACTIONS, NAMELY, THINGS.*

### I.—IN GENERAL.

#### § 146.

By Thing (*res*) is meant whatever neither is nor can be the *subject* of a legal relation,<sup>1</sup> but yet may be the *object* of a legal transaction and so mediately also the object of a right. Things may of course be regarded from many different points of view, but in a work on jurisprudence those divisions only require notice which have some juridical importance,<sup>2</sup> or bear names the meanings of which are not at once obvious.

### II.—SORTS OF THINGS.

#### 1. In commercio, extra commercium.

#### § 147.

The first division of things to be noticed, and it is a very important one, is that into things *in commercio* and things *extra commercium*; the former class consisting of those things which can, the latter class consisting of those which cannot be acquired by private individuals.

*Extra commercium* are all forbidden things, which no private

<sup>1</sup> L. 9. § 4. locati (19. 2.) L. 5. C. de pignor. act. (4. 24.). Weber v. d. Verb. zur Beweisf. VI. Nr. 20—26.

<sup>2</sup> Arg. L. 4. C. de edendo (2. 1.). For the various views of others, see Wernher T. 1. l. 1. Obs. 200. Leyser Sp. 176. m. 5. F. Alef de onere probandae culpa actori nunquam incumbente. Heidelb. 1753. (in dieb. acad. n. 20.). Quistorp Beitr. Nr. 14. Wehrn l. c. § 20. G. J. F. Meister pract. Bemerk. 2. B. Nr. 6. Hasse p. 177—180. 404—413.

<sup>1</sup> L. 5. pr. L. 222. de V. S. (50. 16.). See especially E. C. Westphal System des R. R. über Arten der Sachen. Leipz. 1788. 8.

<sup>2</sup> Schilling Institut. B. 2. § 50—67.

person should possess,<sup>n</sup> and, according to the Romans, all things consecrated to deities (*res divini juris*);<sup>o</sup> such as—

1. *Res sacræ* or things which are consecrated to the immediate service of a deity, and which thereby cease to be subject to the dominion of man until they are either formally divested of their sacred character or seized by enemies.<sup>p</sup> Things which are intended for the mediate service of a deity (*res ecclesiasticæ*) belong to the class of *res universitatis*, but the alienation of such things is fettered.<sup>q</sup>

2. *Res religiosæ*, i.e. a place occupied (not merely temporarily),<sup>r</sup> by a corpse, by a head (at all events if the members are dispersed), or by a funeral urn:<sup>t</sup> such a place is sacred until the removal of the corpse, &c., by some public authority or until the place itself is taken by enemies.<sup>s</sup> A place of burial cannot by itself be alienated,<sup>u</sup> but it is otherwise with respect to a mere monument.<sup>x</sup>

3. *Res sanctæ*, i.e. originally, everything consecrated to the tutelary gods, but later, also everything under the special protection of the state.<sup>y</sup> To this class belong town walls, which nobody is in the absence of special leave allowed even to repair.<sup>z</sup> The changes which these laws have undergone in consequence of the doctrines of Canonists and Protestants ought to be noticed in the introduction to a work on Canon law.<sup>a</sup>

<sup>n</sup> L. 4. § 1. fam. herisc. (10. 2.). Hassenpflug Kleine Schriften B. 1. Leipz. 1845. Nr. 10.

<sup>o</sup> L. 1. pr. h. t. (1. 8.)

<sup>p</sup> § 8. I. h. t. (2. 1.) L. 9. pr. § 1. 2. h. t. (1. 8.) L. 36. de religios. (11. 7.) L. 83. § 5. de V. O. (45. 1.). Exceptions are contained in L. 21. C. de SS. eccl. (1. 2.) Nov. 120. c. 10.

<sup>q</sup> L. 17. (unglossed) C. eod. Nov. 7.

<sup>r</sup> L. 2. § 3. L. 40. de relig. (11. 7.).

<sup>s</sup> L. 36. L. 44. § 1. eod. L. 14. C. eod. (3. 44.).

<sup>t</sup> L. 2. § 5. L. 44. pr. D. eod.—Hence the merely alternative duty in cases of burial in another's land L. 7. pr. D. eod.

<sup>u</sup> L. 12. § 1. eod. L. 2. 4. 9. C. eod. (3. 44.). The right to place a corpse in a grave can be given by will, L. 14. C. de legat. (6. 37.).

<sup>x</sup> L. 6. § 5. L. 7. h. t. (1. 8.). Bynkershoek Obs. L. 1. c. 5. Vryhof Obs. c. 10.

<sup>y</sup> L. 8. pr. § 1. L. 9. § 3. h. t. (1. 8.).

<sup>z</sup> L. 8. § 2. L. 9. § 4. h. t. (1. 8.); see too Höpfner Comm. § 267.

<sup>a</sup> Sintenis Civilrecht B. 1. § 40. Nr. 1.

## 2. Public, Private.

## § 148.

Things which belong to the whole state are termed emphatically *res publicæ*, but this expression is also sometimes employed to denote the property of towns.<sup>b</sup> As examples of public things may be specially mentioned running waters, harbours and highways.<sup>c</sup>

As the things of a corporation are divided into *res universitatis sensu stricto* and *patrimonium universitatis* (see § 115), so may the things of the state be divided into *res publicæ sensu stricto* and *patrimonium populi*; the two divisions being perfectly analogous.

## § 149.

**Special interdicts for such things.**—For the protection of state property,<sup>d</sup> in addition to the ordinary possessory and petitory remedies and to the interdict which can be had by any individual who is specially injured, there are certain interdicts<sup>e</sup> introduced by the Prætors, and which may be instituted by any member of the state; viz.—

A. The interdict *ne quid in loco sacro fiat*.<sup>f</sup> For the purposes of this edict *res sacræ* include *res sanctæ*<sup>g</sup> (§ 147). The interdict may be obtained not only by those whose business it is to protect such property but by any private individual,<sup>h</sup> and its object is to compel the person against whom it is obtained to make good whatever he has illegally done and to restrain him for the future.<sup>i</sup>

<sup>b</sup> L. 15. de V. S. (50. 16.).

<sup>c</sup> L. 4. § 1. L. 5. pr. de rer. div. (1. 8.) L. 1. § 3. de flumin. (43. 12.). As to a public river see Archiv für civil. Prax. 12. B. Nr. 21. K. H. Hofmann Beitr. zur Lehre v. d. Eintheilung d. Sachen. Darmstadt 1831. 1—70. Sintenis *loc. cit.* § 40.

<sup>d</sup> For the modern practice see W. H. Puchta über die gerichtl. Klagen. Giess. 1833. § 166.

<sup>e</sup> Upon this see L. 1. de loc. et itin. publ. (43. 7.). E. C. Westphal de libertate prædiorum. cap. 3—12. Rudorff das gem. Civilrecht. § 349. 353. 355.

<sup>f</sup> Tit. D. ne quid in loco sacro fiat (43. 6.). Weiske Rechtslexikon B. 5. p. 596.

<sup>g</sup> L. 2. 3. eod.

<sup>h</sup> L. 2. § 2. ne quid in loco publ. (43. 8.).

<sup>i</sup> L. 2. § 19. ne quid in loco publ. (43. 8.).

B. The interdict *ne quid in loco publico vel itinere fiat* which can be obtained by any individual and especially if he be himself a sufferer. Its object is sufficiently manifest from its name.<sup>1</sup>

C. The interdict *de loco publico fruendo* which can be had by any person who has received state property for some special purpose, against any one who hinders its due use.<sup>1</sup>

D. The interdict *de via publica et si quid in ea factum esse dicatur* which can be obtained as well by the overseers of roads as by any other person in case a public way is injured, obstructed, or not properly repaired by the neighbouring landowners. Its object is to enforce restoration or repair.<sup>11</sup>

E. The interdict *de via publica et itinere publico reficiendo* which, in case repairs are obstructed, can be obtained by any person especially if himself obstructed.<sup>11</sup>

F. The interdict *ne quid in flumine publico, ripave ejus fiat, quo peius navigetur*; the interdict *ne quid in flumine publico fiat, quo aliter aqua fluat, atque uti priore æstate fluxit*, and the interdict *ut in flumine publico navigare liceat*, all three of which are, as is apparent from their names, for the purpose of securing the free use of public rivers.<sup>9</sup>

G. The interdict *de ripa munienda* which can be obtained by any person who is obstructed in the completion of works useful to his own adjoining land and not hurtful to navigation, and who is willing to give an indemnity against any damage which may accrue within ten years after such completion.<sup>12</sup>

### 3. Corporeal, Incorporeal.

#### § 150.

With respect to their physical properties things are either

<sup>1</sup> Tit. D. de locis et itin. publ. (43. 7.) Tit. D. ne quid in loco publico vel itinere fiat (43. 8.). Weiske Rechtslexikon B. 5. p. 591. &c.

<sup>1</sup> Tit. D. de loco publico fruendo (43. 9.). Weiske Rechtslexikon B. 5. p. 559. &c.

<sup>11</sup> Tit. D. de via publica et si quid in ea factum esse dicatur (43. 10.).

<sup>11</sup> Tit. D. de via publica et itinere publico reficiendo (43. 11.). Unterholzner Schuldverhältnisse B. 2. § 412. 413.

<sup>9</sup> See the thus named titles of the Digest Lib. 43. T. 12. 13. 14. Weiske Rechtslexikon B. 5. p. 589. &c. and p. 625. &c.

<sup>12</sup> Tit. D. de ripa munienda (43. 15.).

corporeal or incorporeal, according as their existence is evident to the senses, or is wholly ideal. Incorporeal are not only things which, taken individually, exist merely in imagination (as for example rights), but also things which, themselves corporeal, form as a class, and consequently in idea, the object of a right.<sup>a</sup>

#### 4. Moveable, Immoveable.

##### § 151.

Corporeal things are moveable or immoveable.<sup>r</sup> Immoveable are—

A. Things immoveable by nature, i.e. things which cannot be transferred from place to place either at all, or at least without being destroyed and taken to pieces ;<sup>s</sup> also things so connected with them that separation cannot take place without destruction.<sup>t</sup>

B. Things immoveable by law,<sup>u</sup> i.e. all moveables designed to be used permanently with, and to form part of a thing immoveable by nature,<sup>x</sup> and which have been already applied with that intent and have not been again separated after a change of mind.<sup>y</sup> Moreover for certain purposes, and especially with reference to the doctrines

<sup>a</sup> Tit. I. de reb. corp. et incorp. (2. 2.) L. 1. § 1. de rer. divis. (1. 8.) L. 46. de cond. ind. (12. 6.) L. 34. § 3. 4. de leg. 1. (30.) L. 94. § 1. de solut. (46. 3.). C. F. G. Meister de philosophia Ictor. Romanor. in doct. de corporibus (opusc. n. 10.). See *contra* Buchholtz Versuche Nr. 1. See also Fritz Erläuterungen. 4. Hft. 161—167. Puchta Coursus der Inst. B. 2. § 222.

<sup>r</sup> See in general P. Voet de reb. mob. et immob. Ultrai 1666-8. L. G. Mogen de vera ac genuin. rer. mob. et immob. indole. Giess. 1760-4. J. G. Haerlin de usu theor. pract. distinct. rer. in mob. et immob. Tub. 1715. [Note to 8th edition.]

<sup>s</sup> L. 18. pr. de act. E. V. (19. 1.).

<sup>t</sup> L. 80. § 2. de contr. emt. (18. 1.) L. 9. de peric. et comm. r. v. (18. 6.) L. 17. § 3. de act. e. v. (19. 1.) L. 12. § 23. de instruct. vel instrum. (33. 7.).

<sup>u</sup> To these things the expression: *accessio rei immobilis* can also be applied. v. Buchholtz Vers. Nr. 2.

<sup>x</sup> L. 17. pr. § 2. 7. 8. 9. L. 13. § 31. L. 14. 15. de act. E. V. (19. 1.) L. 40. § 6. de contr. emt. (18. 1.). A. Kaestner de clausula: was erd-, wand-, band-, mauer-, nied-, nagel- und schraubenfest ist. Lips. 1724.—With this limitation mills in boats belong here. L. 1. § 7. de vi (43. 16.) L. 20. § 4. quod vi aut clam. (43. 24.) compared with Glück Pand. B. 2. § 173.

<sup>y</sup> L. 66. § 2. de contr. emt. (18. 1.) L. 17. § 5. 6. 10. 11. L. 18. § 1. de act. E. V. (19. 1.).

of *cautio*, all valuable things which cannot be removed at one time, such as libraries and stocks of goods, are, in the opinion of some practitioners, to be deemed immoveable.<sup>z</sup>

Moveable are all things which do not come under any of the above descriptions.<sup>a</sup> A subdivision of such things is made into *moventia* and *mobilia* (in a narrow sense), according as they have or not the power of spontaneous motion.<sup>b</sup>

§ 152.

Incorporeal things, and consequently rights, are not themselves either moveable or immoveable, but it may be necessary, in order to use general language, to treat them as one or the other. In so doing the following rules are customarily observed.

A right which is annexed to a thing (as for example, a real servitude, and, at times, the rights of apothecaries and brewers) follows the owner of that thing.<sup>c</sup> A right annexed to no thing is termed moveable or immoveable, according as its object is the former or the latter.<sup>d</sup> But this last rule is in truth only useful with respect to rights *in rem* and not to those *in personam*, for the latter are universally treated as moveable.<sup>e</sup> Consequently rent which has become due,<sup>f</sup> a relief<sup>g</sup> which is due, and the debts of a corporation<sup>h</sup> are to be deemed moveable.

Rights which, like those of pledge, are only accessory to some other right are of the nature of their principal.<sup>i</sup> If the object of a right *in rem* is partly moveable and partly immoveable, the right itself must be considered as partaking of both natures.<sup>k</sup>

<sup>a</sup> I. A. Hellfeld de hypoth. mobil. (op. n. 8.) c. 1. § 11. Wernher lect. c. L. 2. T. 8. § 6.

<sup>b</sup> Hellfeld l. c. cap. 1.

<sup>c</sup> L. 93. de V. S. (50. 16.) L. 1. pr. de aedil. ed. (21. 1.).

<sup>d</sup> L. 47. de contr. emt. (18. 1.).

<sup>e</sup> L. 3. § 15. de vi et vi arm. (43. 16.).

<sup>f</sup> Leyser Sp. 26. m. 2.

<sup>g</sup> Hellfeld l. c. cap. 1. § 15.

<sup>h</sup> C. F. Walch de privil. pecun. hered. § 14.

<sup>i</sup> Voet Comm. ad P. L. 1. T. 8. § 28.

<sup>j</sup> Müller ad Leyser Obs. 115.

<sup>k</sup> Voet Comm. l. c. § 19.



### 5. Fungible, not fungible.

#### § 153.

Another very important division of things is that into fungible and not fungible, or, as some improperly<sup>1</sup> have it, into consumable and unconsumable. Fungible things are things of such a nature that it is, generally speaking, wholly immaterial whether a person has any one in particular or some other like it; things in which this is material are not-fungible. To the former belong, in cases of doubt, all those things which are customarily reckoned by number, measure, or weight.<sup>m</sup>

### 6. Simple, Aggregate.

#### § 154.

A thing which consists of several parts is said to be simple (*singularis*) if those parts are organically blended together, and aggregate or complex (*universalis*) if such be not the case.<sup>n</sup>

A complex thing is called *res connexa* if its parts are mechanically connected, and *universitas* if they are only in idea connected and so form a whole.

An *universitas* which, for the purposes of succession, consists of the inseparable active and passive property of a person is called *universitas juris* as opposed to *universitas facti sive hominis*, which includes every other kind of *universitas*.<sup>o</sup>

<sup>1</sup> For example he who buys a pound of cleaning powder buys that which is fungible though not consumable. See also Pfizer von der Collation § 210—220.

<sup>m</sup> L. 2. § 1. de R. C. (12. 1.). I. Gothofredi D. de functione et aequalitate in mutuo, in opusc. Lugd. B. 1733. p. 517 &c. Bynkershoek Obs. L. 1. c. 10. Cocceii I. C. L. 12. T. 1. qu. 14. 15. A. F. Schott de rebus quae functionem recipiunt. Lips. 1767. (opusc. p. 212.). Grolman u. Löhr Magaz. 4. B. 138. Buchholtz Vers. 23—25.

<sup>n</sup> These divisions are based on L. 23. § 5. de R. V. (6. 1.) L. 30. pr. de A. I. A. P. (41. 2.) L. 30. de usurp. (41. 3.). As the words are new they are, as might be expected, understood in different senses by different persons. See K. H. Hofmann über den Einfluss allgemeiner Pfandrechte &c. Darmst. 1830. 1—69. Buchholtz Versuche Nr. 3. Puchta Cursus der Inst. B. 2. § 222.

<sup>o</sup> See especially C. F. Mühlenbruch obs. iur. Rom. Regimont. 1818. nr. 1. Archiv für civilist. Praxis. 5. B. Nr. 1. 11. B. Nr. 9. 17. B. Nr. 12. Vangerow Leitfaden § 71.

With respect to an *universitas juris*, it is a rule that the possessor thereof who is bound to deliver up the whole, must also deliver up with it every thing which he has received by means or on account of it.<sup>p</sup> Single things, notwithstanding the maxim that a substitute takes the place and nature of that for which it is substituted, do not fall within the above rule;<sup>q</sup> but nevertheless he who has derived a benefit from the thing of another can in general be called upon to account for that by which he is still benefited.<sup>r</sup>

## 7. Divisible, Indivisible.

### § 155.

In another view things are divisible (*dividuae*) or indivisible (*individuae*).<sup>s</sup>

Corporeal things are divisible when, although physically undivided, different parts of them are capable of being the objects of distinct proportional rights; and indivisible in every other case. As a rule land is divisible and a chattel indivisible.<sup>t</sup>

Incorporeal things are indivisible when, if taken distributively, they do not give *pro rata* that which is or can be given entirely by them taken collectively; or when they cannot be legally vested in a number of persons, each of whom has a right concurrent with that of the others.<sup>u</sup>

<sup>p</sup> L. 20. § 1. 2. 10. 12. L. 22. de hered. pet. (5. 3.). Heineccii opusc. posth. p. 499 &c. Branchu Obs. Dec. 1. cap. 6.

<sup>q</sup> L. 6. C. de R. V. (3. 32.). Erl. gel. Anz. v. 1749. Nr. 24.

<sup>r</sup> *Ante* § 7. Note u.

<sup>s</sup> Lyncker de iure rer. individ. ed. A. Hoffmann. Francof. 1710. Hotoman quaest. illustr. c. 18. *et seq.* Vinnii qu. sel. L. 1. c. 28. Especially Molinaeus de divid. et individuis (Opp. T. 2.). Pothier des obligat. Ed. Hutteau T. 1. p. 202—242. A. C. H. Bakker de obligationibus dividuis et individuis. Lugdun. Bat. 1822. J. Rubo Erklärung der L. 2. 3. 4. 85. de V. O., oder über Theilbarkeit und Untheilbarkeit der Obligationen. Berlin 1822. Buchholtz Vers. Nr. 4. Mühlenbruch Pand. B. 2. § 224. 326. C. A. de Scheurl de div. et indiv. oblig. Erlang. 1835. Warnkönig in Rosshirt Zeitsch. B. 3. 67—92. Vangerow Leitfaden § 567. Anm. 2. Wächter im Arch. f. civ. Prax. B. 27. Nr. 7.

<sup>t</sup> L. 8. d. R. V. (6. 1.).

<sup>u</sup> L. 8. de R. V. (6. 1.) L. 25. § 1. de V. S. (50. 16.) L. 17. de servit. (8. 1.) L. 5. § 15. commod. (13. 6.) L. 2. 3. 4. 85. de V. O. (45. 1.) L. 29. de solutt. (46. 3.).

### 8. Principal, Accessory.

#### § 156.

Things considered with reference to one another may be divided into principal (*principales*) i.e. those which are independent and not regarded as part of, or subordinate to anything else, and accessory (*accessiones, caussæ, causæ externæ*)\* i.e. those which are dependent upon and only regarded as part of or subordinate to some other thing. To things accessory belong all appurtenances, all outlays on or in respect of a thing, all produce derived from it, as well as damages and interest.† With respect to accessories it is necessary to notice the important rule (which is, however, subject to certain exceptions) that no person having had a right to demand a principal thing with its accessories can recover the latter alone if his right of action in respect of the principal thing is gone,‡ and if he has no independent right to the accessories.¶

### A. APPURTENANCES.

#### § 157.

Appurtenances (*pertinentiæ*) denote those accessories which, without any express stipulation, pass with a thing into whose hands soever it may come, as for example—

a. All those incidents which are included in the very idea of a thing, and pass with it to a possessor as such.

b. All those things which, according to §§ 151, 152, are by law deemed to be immoveable in consequence of their relation to that which is so in fact; and therefore by analogy.

\* *Accessio* is properly that which becomes accessory by external means. L. 2. § 1. de in diem addict. (18. 2.) L. 61. § 2. de furt. (47. 2.). \*Buchholtz Versuche Nr. 6.

† Tit. D. de usuris, et fructibus, et causis, et omnibus accessionibus (22. 1.) L. 20. de R. V. (6. 1.) L. 31. de R. C. (12. 1.).

‡ L. 3. C. de fruct. et lit. expens. (7. 51.) L. 13. C. de usur. (4. 32.) L. 49. § 1. de act. emt. vend. (19. 1.) Leyser Sp. 99. n. 8. Carpzov L. 2. resp. 79. m. 18. Köchy Meditat. 1. Samml. Nr. 24. Archiv für civilist. Praxis. 1. B. Nr. 17.

¶ L. 75. § 9. de V. O. (45. 1.) L. 61. § 3. de furtis (47. 2.) Glück Pand. B. 4. § 331.

c. Those things which are similarly related to moveables or appurtenances.<sup>b</sup>

That a thing which is not part of or necessary to the completion of another thing, but was nevertheless destined by its former owner not to be separated from it, remains continually as an appurtenant thereto, can only be maintained upon the ground that a deliberate intention is as binding as a unilateral disposition.

Things may also be appurtenant by an express provision of some law.<sup>c</sup> There is no presumption that a thing is appurtenant<sup>d</sup> to or absolutely inseparable from its principal.\*

## B. OUTLAYS.

### § 158.

Outlays are of two sorts, viz.: first such as are made on a thing itself (*impensæ*), secondly such as are made not on the thing itself but for its improvement (*expensæ*).<sup>f</sup> An outlay, as regards its result, may be either advantageous or not; and in the first case it may be *necessary*, i.e. requisite for the preservation of the thing; <sup>g</sup> or *useful*, i.e. such as increases its ordinary utility; <sup>h</sup> or *extravagant* (*voluptuarie*) i.e. such as merely renders the thing more agreeable.<sup>i</sup> Extravagant outlays, moreover, under certain circumstances, may not be advantageous.<sup>k</sup>

<sup>b</sup> L. 49. de contr. emt. (18. 1.) L. 44. de evict. (21. 2.) L. 12. § 6. de instructo (33. 7.). Berger oecon. L. 2. Th. 2. n. 7. Sinenis Civilrecht B. 1. § 41.

<sup>c</sup> C. F. Hommel Pertinenz und Erbsonder. Register. 6te Aufl. Leipz. 1803. E. C. Westphal v. den Pertinenz-St. eines verk. Hauses. Hal. 1778. Gesterding neue und alte Irrthümer 301—390. G. L. Funke doctr. de pertinentiis aedificiorum immediatis. Lips. 1824. (also in German under the title of Funke die Lehre von den Pertinenzen. Chemnitz 1827.).

<sup>d</sup> S. Stryk de probat. pertinentiarum. Frk. ad V. 1688. in Diss. Vol. 4. n. 3.

<sup>e</sup> Leyser spec. 100. 101.

<sup>f</sup> This is not a Roman distinction L. 14. § 1. comm. div. (10. 3.) L. un. § 5. C. de rei ux. (5. 13.). J. N. de Wening-Ingenheim de impensis earumque restitutione. Heidelb. 1841.

<sup>g</sup> L. 1. § 1. L. 14. pr. de imp. in rem dot. (25. 1.) L. 79. pr. de V. S. (50. 16.).

<sup>h</sup> L. 14. § 1. de imp. in rem dot. (25. 1.) L. 79. § 1. de V. S. (50. 16.).

<sup>i</sup> L. 79. § 2. de V. S. (50. 16.) L. 7. pr. L. 14. § 2. de imp. in rem dot. (25. 1.). See too Pfizer von der Collation § 255.

<sup>k</sup> L. 28. 29. 38. de R. V. (6. 1.).

## C. PRODUCE OR FRUITS.

## § 159.

Produce (*fructus*) properly signifies that which is engendered by a *thing* (in its narrowest sense) by virtue of its own inherent powers: whether that which is so produced is usual or not is however of no moment (*fructus ordinarius* or *extraordinarius*).<sup>1</sup> That which is not yielded by a thing *proprio vigore* as is the case with money, and that which is not produced by a thing in its narrowest sense, as is the case with a slave child, are not included in the term produce.<sup>m</sup>

## § 160.

**Natural.**—Produce is divided into strictly natural (*fructus mere naturales*) and artificial (*fructus industriales*), according as to come into existence it does not or does require human aid.<sup>n</sup>

Produce, of whichever sort, if not yet disannexed from the principal thing is said to be in suspense (*pendentes*);<sup>o</sup> if disannexed it is further distinguished into separated and collected (*separati* and *percepti*):

Collected (*percepti*) is that disannexed produce which has already by some means or other become subject to the power of the person entitled to it.

Separated (*separati*) is that disannexed produce in which this has not happened.<sup>p</sup> But produce which, like the young of animals, is not usually disannexed by man is from the moment of disannexation considered as collected.<sup>q</sup>

Collected produce moreover is said to be existing (*exstantes*) if

<sup>1</sup> L. 77. de V. S. (50. 16.). See especially Wolffrad D. (præs. G. L. Boehmer) sistens theor. general. de acquis. fruct. Goett. 1783. Sect. 1. G. E. Heimbach die Lehre v. d. Frucht. Leipz. 1843.

<sup>m</sup> § 37. I. de rer. div. (2. 1.) L. 7. § 12. solut. matrim. (24. 3.) L. 28. § 1. de usuris (22. 1.). Thibaut civil. Abh. 35. 36.

<sup>n</sup> L. 45. de usur. (22. 1.) L. 48. pr. de A. R. D. (41. 1.). against this division see Heimbach *ubi supra* 40—43.

<sup>o</sup> L. 44. de R. V. (6. 1.) L. 27. pr. de usufr. (7. 1.).

<sup>p</sup> L. 78. de R. V. (6. 1.) L. 13. quib. mod. usufr. amit. (7. 4.) L. 12. § 5. de usufr. (7. 1.) L. 48. pr. de A. R. D. (41. 1.). Perennonus animadv. L. 1. c. 5. (Otto Thes. T. 1. p. 597). Heimbach *ubi supra* 43—92.

<sup>q</sup> L. 28. pr. de usur. (22. 1.) Cocceii I. C. L. 7. T. 1. qu. 8.

still in a person's possession; and consumed (*consumti*) if used up or, consequently, parted with by him.<sup>r</sup>

Produce which has not been taken by the person in possession of a thing, and which either he himself or the owner of the thing might have taken, is said to be neglected (*percipiendi*).<sup>s</sup>

### § 161.

**Civil**.—That which is not produced out of a thing, but is received by one person for its use by another or by way of compensation for its diminished utility cannot properly be called the produce of that thing, but is nevertheless juridically treated as produce and is distinguished from that already spoken of (and which is then called natural) by the term civil (*fructus naturales et civiles*).<sup>t</sup> The above divisions (§ 160) are not applicable to civil produce. Nevertheless, it is a recognised principle, that when a person in consideration of produce which is civil enjoys that which is natural, the civil produce is, so far as regards him who ought to receive it, considered as collected as soon as the natural produce has been in fact collected by the person entitled to receive it.<sup>u</sup>

### § 162.

Civil produce includes more particularly interest and reward for hire. Of the last nothing requires notice in this place, the first is however of great consequence and can only be discussed with advantage after an explanation of the principal doctrines relating to damages and value.\*

<sup>r</sup> L. 28. § 2. de pignor. act. (13. 7.) L. 4. § 2. D. fin. reg. (10. 1.) § 35. I. de rer. div. (2. 1.) L. 22. C. de R. V. (3. 32.).

<sup>s</sup> L. 33. L. 62. § 1. de R. V. (6. 1.) § 2. I. de offic. iud. (4. 17.). Weber zu Höpfner § 333. Note \*.

<sup>t</sup> L. 62. pr. de R. V. (6. 1.) L. 34. de usuris (22. 1.) L. 121. de V. S. (50. 16.). Against this expression see Heimbach *ubi supra* 29—40.

<sup>u</sup> L. 25. § 2. L. 26. L. 58. pr. de usufr. (7. 1.) Voet Comm. L. 7. T. 1. § 30. L. 18. Tit. 6. § 9. *contra* Heimbach *ubi supra* 91.

\* In thus rendering the German word *Interesse*, which seems to have a meaning somewhat similar to that of our word interest in the expression "all one's estate and interest," the translator is aware of the objections which may be urged against the term he has chosen; he knows however of no other word

## D. DAMAGES.

## § 163.

By damage (*damnum*) in general, is meant diminution of a person's property.<sup>x</sup> If property already actually acquired be depreciated the damage is termed positive (*damnum emergens positivum*); whilst the damage resulting when the acquisition of gain is prevented is termed negative (*damnum negativum, lucrum interceptum sive cessans*).<sup>y</sup>

## § 164.

**Æstimatio.**—The word *æstimatio* taken in a loose sense comprehends whatever is agreeable,<sup>z</sup> but in a juridical sense it has reference to damage whether positive or negative.<sup>a</sup> The Romans sometimes used the word to express only that which can be demanded over and above the market value of a thing (*vera rei æstimatio, quanti res est*),<sup>b</sup> at other times to express only positive damage.<sup>c</sup> The expression *quanti ea res est* however also denotes

which so nearly conveys the meaning denoted by the Latin *æstimatio* and the German *Interesse*. To have used the word *interest* would have created endless confusion from its also denoting per centage.

<sup>x</sup> For the doctrines respecting damages and value, see especially I. M. Magnus de eo quod interest. (Meerman Thes. T. 3. p. 294.) G. de Gast C. in Tit. C. de sentent. quae pro eo quod interest. (Meerman Thes. T. 6. p. 762.) G. Catiani de eo quod interest. (Meerman T. 7.) H. Donellus ad leg. Iustiniani de sent. quae pro eo quod interest profer. s. liber de eo quod interest. 1596. also in his Comm. L. 26. G. Vallii lib. sing. ad L. un. C. de sent. quae pro eo quod interest (Otto Th. T. 1.). Wehrn doctr. explicatrix principior. damni etc. cap. 1. 6. I. F. Malblanc obs. quaedam de eo quod interest. Tub. 1801. F. Hänel vom Schadensersatz. Leipz. 1823. Fritz Erläut. 3. Hft. p. 71—103. J. R. v. Wening-Ingenheim die Lehre vom Schadensersatz. Heidelb. 1841. Puchta Pand. § 224—226.

<sup>y</sup> L. 3. de damn. inf. (39. 2.) § 10. I. de leg. Aquil. (4. 3.) L. 2. rat. rem. haber. (46. 8.) L. 2. C. si quis aliquem testar. proh. (6. 34.) L. 2. § 11. 12. ne quid in loco publico. (43. 8.).

<sup>z</sup> L. 19. ad exhib. (10. 4.).

<sup>a</sup> L. 21. 22. 33. ad L. Aquil. (9. 2.).

<sup>b</sup> L. 27. §. 5. ad leg. Aquil. (9. 2.) L. 1. pr. L. 3. § 11. uti poss. (43. 17.) L. 9. de in lit. iur. (12. 3.) L. 1. § 20. de tut. et rat. (27. 3.) L. 50. pr. L. 80. § 1. de furt. (47. 2.) L. 179. L. 193. de V. S. (50. 16.) Malblanc § 4. 5. Savigny System B. 5. app. XII. § 1—7.

<sup>c</sup> L. 71. § 1. de furt. (47. 2.).

the entire value, i.e. the whole of a person's interest in a thing.<sup>d</sup>

### § 165.

Damage and value may be measured either by common opinion (market value) or by the individual feelings of the person injured.<sup>e</sup> In the former case the value (*estimatio*) is termed *communis*, in the latter *singularis*; but different meanings are attached by different persons to these words.<sup>f</sup> As a rule, anything may be the object of a person's affections;<sup>g</sup> even things fungible (§ 153) may be so if they be not claimed merely as some of a class.<sup>h</sup>

### § 166.

**Damage.**—With respect to its cause, damage is either—

1. Accidental (*casuale*); i.e. caused by some irresistible force whether acting upon a person or not;<sup>i</sup> or

2. Free (*non casuale, liberum*); and this again may be indirect or direct according as it does or not arise from the due exercise of a right.<sup>k</sup>

Direct damage again may arise but not be attributable either to negligence or to fraud. In such a case the damage is free but not imputable (*damnum directum nec dolosum nec culposum*). If, however, direct damage arises solely from either negligence or fraud the damage is said to be direct and absolute (*d. directum absolutum, mere culposum, mere dolosum*); and if it arises from

<sup>d</sup> L. 17. pr. L. 18. pr. § 1. 4. de dolo (4. 3.) L. 68. de rei vind. (6. 1.) L. 11. de stip. praet. (46. 5.) L. 8. § 2. ratam rem (46. 8.) L. 4. § 7. de damn. inf. (39. 2.) L. 1. § 5. ne vis fiat (43. 4.) Savigny *loc. cit.* app. XII. § 8.

<sup>e</sup> L. 6. § 2. de operio (7. 7.) L. 33. ad L. Aquil. (9. 2.) L. 54. pr. mandat. (17. 1.) L. 1. pr. de act. e. v. (19. 1.) L. 63. pr. ad L. Falc. (35. 2.).

<sup>f</sup> Compare Wehrn *loc. cit.* § 55. § 65. not. 12.

<sup>g</sup> The contrary is supposed by C. Thomasius de pret. affect. in res fungib. non cadente. Hal. 1701. cap. 1. § 25 &c.

<sup>h</sup> Proof of this may be derived not only from the nature of the thing but also from the rule *genus cum genere compensandum*.

<sup>i</sup> L. 5. § 2. ad L. Aquil. (9. 2.) L. 20. commod. (13. 6.). Averan. int. L. 2. c. 26.

<sup>k</sup> L. 5. pr. L. 31. in f. L. 45. § 4. ad L. Aquil. (9. 2.) L. 26. de damn. inf. (39. 2.) L. 7. § 4. quod vi aut clam (43. 24.).



and is remotely caused by both together it is termed mixed (*mixtum*).<sup>1</sup>

§ 167.

**Compensation.**—The legal doctrines relating to damages and compensation may be thus stated:

1. He who has to make compensation generally, is only bound to make good that damage which is a certain necessary consequence of his own wrongful act, and which could not be averted by the other person (*damnum ex re*)<sup>m</sup> but is not bound to make good the loss of a gain merely possible or damage which was avoidable by the person injured (*damnum extra rem datum*).<sup>n</sup>

2. In no case in which the person injured is entitled to a certain determinate thing, can more than double its market value be obtained; unless indeed the obligation to make compensation arises from a crime.<sup>o</sup> Attempts are frequently made in all sorts of ways to limit the operation of this obscure law.<sup>p</sup>

3. The liability to make good the value of a thing may arise from any of the ordinary sources of obligations, as from fraud, negligence, (and consequently from delay) and from contract.<sup>q</sup> No one is usually bound to make good damage which is indirect,<sup>r</sup>

<sup>1</sup> See for example L. 30. de pignor. act. (13. 7.). F. C. T. Hepp die Zurechnung. Tüb. 1838, § 8, 9.

<sup>m</sup> § 10. I. de L. Aquil. (4. 3.) L. 3. si quadrupes (9. 1.) L. 7. pr. L. 23. pr. § 2. ad L. Aquil. (9. 2.) L. ult. qui effud. (9. 3.) L. 3. de condiet. furt. (13. 1.) L. 13. pr. de act. e. v. (19. 1.) L. 19. de usur. (22. 1.) L. 35. pr. de legat. III. (32.) L. 78. de R. I. (50. 17.).

<sup>n</sup> L. 19. de peric. et comm. r. v. (18. 6.) L. 21. § 3. de act. E. V. (19. 1.) compared with L. 2. § 8. de eo quod certo loco (13. 4.). Donellus, comment. L. 26. c. 23. Seusfert Erört. einz. Lehren. Abth. 1. Nr. 20. For several different opinions see in Vaudius quaest. L. 2. qu. 8. Pfeiffer vermischte Aufsätze. 1803. Nr. 5. Schöman vom Schadensersatz 2. B. 84—142. Gesterding Nachforschungen 1. Thl. 3—27.

<sup>o</sup> L. un. C. de sentent. quae pro eo quod interest (7. 47.). W. Sell Jahrbücher B. 1. Nr. 5.

<sup>p</sup> Compare for example Wehrn l. c. § 56. 61.

<sup>q</sup> L. 45. de contr. emt. (18. 1.) L. 25. § 2. ad Sct. Treb. (36. 1.) L. 2. § 8. de eo quod certo loco (13. 4.) L. 1. pr. de act. e. v. (19. 1.) L. 13. pr. ratam rem hab. (46. 8.).

<sup>r</sup> L. 3. § 7. de incend. ruin. naufr. (47. 9.) L. 9. § 1. de condiet. causs. dat. causs. non sec. (12. 4.). Compare L. 9. § ult. L. 31. ad L. Aquil. (9. 2.).

(§ 166) or which arises from his accidental or free, but not imputable act.<sup>a</sup> If in the last case the law imposes a duty to make compensation it is, in general, limited to the market value of the thing.<sup>t</sup>

4. Mixed damage is to be treated exactly as if it were direct and absolute<sup>u</sup> (§ 166).

5. According to the generally received opinion damage which arises from fraud or *culpa lata* is to be measured by the value peculiar to the person injured, but in less culpable cases by the common value<sup>x</sup> (§ 165); but yet the affections are never considered as the object of compensation,<sup>y</sup> and the distinction is said to arise from the fact that, in cases of fraud and gross negligence,<sup>x</sup> evidence of the common value<sup>a</sup> can be obtained by the oath of the person injured,<sup>b</sup> whilst in other cases such evidence

\* L. 60. de R. V. (6. 1.) L. 5. § 2. L. 7. § 2. L. 30. § 3. ad L. Aquil. (9. 2.) L. ult. in f. de administr. et peric. tutor. (26. 7.). Thibaut Vers. 2. B. Nr. 8. Hepp *loc. cit.* 19. Vangerow Leitfaden § 571. Anm. 2. The contrary opinion is newly put forward by I. F. A. Diedemann obs. iur. civ. de damno et pauperie. Lips. 1804. cap. 1.

<sup>t</sup> L. 2. § 4. de leg. Rhodia (14. 2.) L. 74. § 1. de evict. (21. 2.) L. 25. § 2. ad SCt. Treb. (36. 1.).

<sup>u</sup> L. 15. de vi et vi arm. (43. 16.) L. 48. § 4. de furt. (47. 2.) L. ult. de condiet. furtiv. (13. 1.) L. 13. de negot. gest. (3. 5.) L. 11. §. 1. locat. (19. 2.).

<sup>x</sup> The following passages are more especially relied upon L. 68. de R. V. (6. 1.) L. 4. § 4. L. 5. § 3. de in litem iureiur. (12. 3.) L. 16. § 3. de pignor. (20. 1.) L. 40. pr. de damno infect. (39. 2.) L. 54. pr. mandati (17. 1.) L. 2. C. de in lit. iur. (5. 54.). Thomasius Diss. cit. cap. 3. For somewhat different opinions see Wehrn l. c. § 64. Glück Pand. B. 4. § 333. Nr. 2. *Contra* Schöman vom Schadensersatz 2. B. 90—95.

<sup>y</sup> L. 6. § 2. de operio (7. 7.) L. 33. ad Leg. Aquil. (9. 2.) L. 63. pr. ad leg. Falc. (35. 2.). Corasius misc. cap. 6. misc. 1. F. L. Wirsching über das iuramentum in litem. Landshut 1806. § 66. 68. 82. 83. Drummer Theorie des Würdungsseides. Bamberg 1806. 30. Mühlenbruch Pand. B. 2. § 369. Vangerow Leitfaden § 571. Anm. 3. see *contra* Schöman vom Schadensersatz 2. B. 154. Glück Pand. 12. Bd. 421—437. Gesterding Nachforsch. 1 Th. 27—44. Schweppe R. Priv. R. 1. B. § 203. F. O. Schwarze in Zeitsch. f. Rechtspflege f. Sachsen B. 4. Leipz. 1844. Nr. 17.

<sup>a</sup> L. 4. § 4. L. 5. § 3. de in lit. iur. (12. 3.) L. 2. C. eod. (5. 53.).

<sup>b</sup> L. 1. pr. de in lit. iur. (12. 3.) Unterholzner Schuldverhältnisse B. 1. § 129. Schröter in Linde Zeitschr. B. 7. 395.

<sup>c</sup> Against the limitation of this oath to actions in which restitution or exhibition is sought see (L. 68. de rei vind. (6. 1.) L. 5. pr. depositi (16. 3.)

can only be obtained from external sources. Of course in order that such compensation may be demanded the requisite degree of negligence must be imputable on the general principles relating to *culpa*.

6. No one is answerable for damage caused by another, unless he be bound, and be in a position to prevent the damage, or unless he wrongfully urge the other on.<sup>c</sup>

### § 168.

**Condictio triticaria.**—It is very commonly believed that in transactions *stricti juris*, no damages could originally be recovered, but that at a later period an action for this peculiar purpose was introduced under the name of the *condictio triticaria*.<sup>d</sup> It is more probable, however, that the *triticaria* merely expressed that the *condictio* was adapted for the recovery not of a certain sum of money, but of something else.<sup>e</sup> The question is wholly immaterial in a practical point of view, since, whatever the nature of the transaction, a right to damages is now recognised, and the remedy for them is no longer known by any technical name.<sup>f</sup>

## E. INTEREST.

### § 169.

By interest (*usuræ*) is meant that which a person is bound to pay

Schröter *loc. cit.* 362. Savigny System B. 5. app. XIII. Nr. 3.), see Unterholzner Schuldverhältnisse B. 1. § 130. Puchta Cursus B. 2. p. 182. Sintonis Civilrecht B. 1. § 29. p. 275.

<sup>c</sup> L. 5. § 13. L. 19. 20. commod. (13. 6.) L. 41. locat. (19. 2.) L. 31. pr. de act. emt. (19. 1.) L. 20. commun. divid. (10. 3.). Wehrn § 2. Voet Comm. L. 10. T. 3. § 4.

<sup>d</sup> For different theories see Noodt Comm. L. 13. T. 3. Leyser Sp. 150. Westenberg de caus. obl. Diss. 7. c. 5. Wachendorff de cond. tritic. (in his trias Diss. Trai. 1730). Strauch de eod. argum. Ien. 1670. Weiske Rechtslexikon B. 2. p. 909.

<sup>e</sup> L. 1. de cond. trit. (13. 3.) Comp. with L. 12. de novat. (46. 2.). Thomasius ad Huber L. 13. T. 3. § 1. Cocceii I. C. L. 13. T. 3. qu. 1. Pufendorf T. 2. Obs. 41. Glück Pand. 13. Bd. § 843. Gaus Obligationenrecht 48—56. 65—80. 85—88. Rubo Erklär. der L. 2. 3. 4. 85. de V. O. Berlin 1822. p. 22—32. 54—87. Savigny System B. 5. app. XIV. Nr. 33—39.

<sup>f</sup> Cocceii l. c. qu. 11.

by way of remuneration or damages for the permitted or unpermitted use of the fungible things of another; the payment being made in things of a like nature with those enjoyed and at some general rate fixed by law or agreement.<sup>g</sup>

### § 170.

If there were no special positive laws relating to interest the obligation to pay it would be necessarily referred to the same sources from which other obligations spring, and the rate of interest payable would be considered entirely matter of agreement. But the Mosaic and the Canon laws prohibit the taking of any interest,<sup>h</sup> and even if we neglect both of these and turn to the Roman or German law, we shall find many special provisions which relate both to the cases in and the rate at which interest is payable. These laws deserve a close examination.

### § 171.

The sources of an obligation to pay interest are as follows:<sup>i</sup>

I. All the usual sources of obligations; consequently—

1. Agreements (*usura conventionales*); but by the Roman law, an obligation to pay interest could not be effectually imposed by a *pactum adjectum*, if the principal transaction was by its nature gratuitous.<sup>k</sup>

2. Unpermitted transactions (*usura punitoria*);<sup>l</sup> hence interest is payable—

<sup>g</sup> L. 13. § 20. de act. e. v. (19. 1.) L. 3. § 4. L. 17. § 8. h. t. (22. 1.) L. 23. 25. C. h. t. (4. 32.). See especially C. Salmasius de modo usurar. Lugd. Bat. 1639. I. F. Gronovius de usuris centesimis et fœnor. unciar. ibid. 1671. G. Noodt de fœnore et usur. (in opp. T. 1.).

<sup>h</sup> Tit. X. de usuris (5. 19.). Compare I. H. Boehmer I. E. P. I. 5. Tit. 19. I. D. Michaelis de mente et ratione legis Mos. usur. prohibente. Erf. 1746.

<sup>i</sup> See generally A. D. Weber Vers. über das Civ. R. Nr. 3. Fritz Erläut. Hft. 3. p. 23—33. Rudorff gem. Civilrecht § 219.

<sup>k</sup> L. 3. C. de usur. (4. 32.). Weber *loc. cit.* § 4. The exceptions are found in L. 5. § 1. L. 7. de nautico fœnore (22. 2.) L. 30. h. t. (22. 1.) L. 12. 23. C. h. t. (4. 32.) Nov. 136. c. 4. 5. Noodt L. 3. c. 2.

<sup>l</sup> Against this division see Unterholzner Schuldverhältnisse B. 1. § 156.

A. Except in transactions *stricti juris*,<sup>m</sup> by every delaying debtor (*usure moræ*);<sup>n</sup>

B. By every one who wrongfully prevents another from employing his own money;<sup>o</sup>

C. By every one who, being entrusted with another person's money, neglects it;<sup>p</sup>

D. By every one who, not being authorised so to do, uses the money of another person for his own benefit.<sup>q</sup>

3. Independently of the above sources, an obligation to pay interest arises by virtue of general law—

A. From pollicitations;<sup>r</sup>

B. From testamentary dispositions;<sup>s</sup>

C. Where a person does not lend his money out for employment, but himself employs it usefully for the benefit of another;<sup>t</sup>

D. Where interest is obtained by using another's money, not in an unlawful way but still, under such circumstances that he who obtains the interest has no right to apply it to his own use.<sup>u</sup>

II. Special legal provisions by which—

1. Minors, in case of every deferred payment by their debtors,<sup>v</sup>

<sup>m</sup> L. 22. de donat. (39. 5.). Noodt L. 3. c. 12. This as well as what is referred to in note *k* is now obsolete. Grass Collat. iur. R. Sect. 6. I. F. Hombergk zu Vach de usur. in contract. strict. iur. sec. rec. imp. de A. 1600. § 139. Marb. 1730.

<sup>n</sup> L. 24. depos. (16. 3.) L. 32. § 2. h. t. (22. 1.). Hartitzsch Prakt. Rechtsfragen. Leipz. 1840. Nr. 454.

<sup>o</sup> Arg. L. 33. pr. ad L. Aquil. (9. 2.). Leyser Spec. 244. m. 5. Buchholtz jurist. Abh. 169. 170. Note 1.

<sup>p</sup> L. 19. § 4. de neg. gest. (3. 5.) L. 7. § 3. L. 15. L. 58. § 1. de admin. tutor. (26. 7.).

<sup>q</sup> L. 38. de neg. gest. (3. 5.) L. 28. in f. depos. (16. 3.) L. 10. § 3. mandat. (17. 1.) L. 1. § 1. h. t. (22. 1.) L. 7. § 10. 12. de admin. et per. tut. (26. 7.) L. 1. C. de usur. pup. (5. 56.).

<sup>r</sup> L. 10. de pollic. (50. 12.).

<sup>s</sup> L. 3. § 6. de ann. legat. (33. 1.).

<sup>t</sup> L. 2. L. 19. § 4. de neg. gest. (3. 5.) L. 12. § 9. mandat. (17. 1.) L. 67. § 2. pro socio (17. 2.) L. 3. § 1. 4. de contrar. tut. act. (27. 4.) compared with L. 10. § 5. de in rem verso (15. 3.).

<sup>u</sup> L. 19. § 4. de negot. gest. (3. 5.) L. 10. § 3. mandat. (17. 1.).

<sup>v</sup> According to Madai Lehre v. d. mora 152. only in legacies and bonae fidei contractus.

even though they be not chargeable with delay, can claim customary interest;<sup>y</sup>

2. The Fisc is empowered to demand 6 per cent., even in the absence of any contract, but is never bound to pay interest except when succeeding to some other person bound to pay it;<sup>z</sup>

3. The buyer of a thing (not on credit) is, even though he be not chargeable with delay, bound to pay interest from the time the thing is delivered until its price is paid or duly deposited;<sup>a</sup>

4. Whenever interest has been for ten years paid on capital, the right to which is not disputed, that same interest is held, at least by many persons, to continue payable;<sup>b</sup>

5. No interest is however payable in respect of the withheld produce of a thing to be restored,<sup>c</sup> *accessio accessionis non datur*; but an exception was made in favour of an heir in respect of produce derived before the *litis contestatio*.

Interest in all the above mentioned cases, except in those distinguished as I., 1, 2, and 3, A, B, is called *usuræ legales*.

#### § 172.

**Rate of interest.**—The rate of interest may be fixed either by agreement or by legal enactment.

Where interest is payable by law, interest at a rate not higher

<sup>y</sup> L. 87. § 1. de leg. 2. (31.) L. 26. § 1. de fideio. lib. (40. 5.) L. 3. C. in quib. caus. in int. rest. non est nec. (2. 41.) L. 5. C. de act. e. v. (4. 49.) Weber *loc. cit.* § 3. According to many there is an exception when the debtor is not aware of the debt, Müller ad Leyser Obs. 439.

<sup>a</sup> L. 17. §. 5. 6. L. 43. h. t. (22. 1.). But see P. G. L. W. Waldeck Controversen-Entscheidungen. 1. Th. 143—154.

<sup>b</sup> Vatican. Fragm. § 2. L. 13. § 20. de act. e. v. (19. 1.) L. 5. C. eod. (4. 49.) L. 18. § 1. h. t. (22. 1.) L. 2. C. eod. (4. 32.) compared with Struben 4. B. 102. Bed. Pufendorf T. 3. Obs. 170. Müller ad Leyser Obs. 437. Weber *loc. cit.* § 7.

<sup>c</sup> Especial reliance is placed on L. 6. pr. § 1. h. t. (22. 1.) compared with L. 7. C. eod. (4. 32.) L. 28. C. de pact. (2. 3.). For the different opinions see Leyser Sp. 143. m. 7. 8. and Wernher lect. comm. L. 22. T. 1. § 9. Gesterding alte und neue Irrthümer Nr. 1. Glück Pand. 21. B. § 1130. W. Müller civ. Abh. Giess. 1833. Nr. 6. H. Keller in Sell Jahrb. B. 3. Nr. 5.

<sup>e</sup> L. 15. h. t. (22. 1.) compared with L. 51. § 1. de hered. pet. (5. 3.) L. 18. de his quæ ut indign. (34. 9.). Noodt L. 2. c. 12.

than what is allowed by law is termed legal (*legales, legitimæ*), and that which is higher is illegal (*illicitæ, mordentes*).

The rate of interest which in doubtful cases is fixed by usage, or some other way besides law and contract, is called customary.

The rate of interest which is payable by contract may be fixed or not by the terms of the contract; if it be not fixed the customary rate of interest is to be paid;<sup>d</sup> if it be fixed and the capital is to be repaid with interest at the stipulated rate on a day named, the same fixed rate of interest continues payable, even after the day is passed, so long as the capital remains due.<sup>e</sup>

### § 173.

**Illegal interest.**—The most important principle relating to interest is that certain rates of interest only can be made payable by agreement, and that the rate of interest payable otherwise than by agreement is also limited in amount. The most modern doctrines of the Roman law are :

I. With respect to interest made payable by agreement : *personæ illustres*, and others of higher rank cannot stipulate for more than 4 per cent., merchants not more than 8 per cent., and other persons not more than 6 per cent. Interest at the rate of 12 per cent. (*nauticum fœnus*) is allowed only when payable for insurance against the perils of the sea (*pecunia trajectitia*) or of other dangerous places,<sup>f</sup> or where the debt consists of some fungible thing other than money.<sup>g</sup> As a general rule then, 6 per cent. is the highest rate of interest which can be made payable by agreement even to the Fisc.<sup>h</sup>

II. With respect to interest payable by way of penalty or otherwise than as above, 6 per cent. is the general limit;<sup>i</sup> but a person who is in a position to demand interest by way of penalty

<sup>d</sup> L. 34. de R. I. (50. 17.). Voet Comm. L. 22. T. 1. § 8.

<sup>e</sup> Arg. L. 13. § ult. locat. (19. 2.). Carpzov. P. 2. C. 30. def. 5.

<sup>f</sup> L. 5. de naut. fœn. (22. 2.). Noodt L. 2. c. 7. Stryk U. M. P. L. 22. T. 2. § 2. see especially M. H. Hudtwalker de fœnore nautico Romanorum. Hamb. 1810. Weiske Rechtslexikon vol. 4. p. 318.

<sup>g</sup> L. 23. L. 26. § 1. C. de usur. (4. 32.). Noodt L. 2. c. 8.

<sup>h</sup> L. 3. C. de fisci usur. (10. 8.).

<sup>i</sup> L. 26. § 1. C. cit.

can require a higher rate if he can show that 6 per cent. is inadequate under the circumstances of the case;<sup>k</sup> if he fails to show this there is no law to prevent him from insisting upon the legal rate of interest.<sup>l</sup>

These general rules which are laid down in the Code are subject to certain exceptions.<sup>m</sup> There are special laws by which 12 per cent. is payable—

1. By him who does not obey a legal judgment within four months after its publication ;<sup>n</sup>

2. By him who refuses compensation for that which is expended by another upon a thing belonging to both ;<sup>o</sup>

3. By him who, not being authorised so to do by another, fraudulently and of his own accord applies to his own use the money of that other.<sup>p</sup>

There are also some cases in which only 4 per cent. is payable.<sup>q</sup>

#### § 174.

By the laws of the German empire the only invariable rules are that the purchaser of a perpetual annuity cannot demand more than 5 per cent. for his capital,<sup>r</sup> and that in case of a loan remaining unpaid after the time fixed for its repayment 5 per cent. is also the rate of interest recoverable, unless it can be shown that that rate affords

<sup>k</sup> L. 3. de in lit. iureiur. (12. 3.). *Contra* Malblanc de eo quod interest. Tub. 1801. § 8.

<sup>l</sup> Stryk cautel. contr. S. 2. c. 1. § 26. *Contra* Lauterbach coll. L. 22. T. 1. § 24. Hofacker princ. iur. R. G. T. 3. § 1848.

<sup>m</sup> Nov. 158. pr. Those therefore are wrong who in consequence of L. 26. C. cit. think with Voet L. 22. T. 1. § 2. that the special laws are repealed. I. Strauch de centes. usur. Ien. 1672. pag. 51. 52.

<sup>n</sup> L. 2. 3. C. de usur. rei iudic. (7. 54.).

<sup>o</sup> L. 4. C. de aedific. privat. (8. 10.).

<sup>p</sup> L. 7. § 4. L. 54. de admin. tutor. (26. 7.) L. 38. de negot. gest. (3. 5.). Strachl. c. A. D. Weber *loc. cit.* § 6. Note 11. Glück Pand. 15. B. § 955. p. 294. 225. See *contra* Voet l. c. § 2. I. G. Bauer de usuris sorti imputand. vel repetendis. Lips. 1760. (op. T. 1. n. 26.). Puchta Pand. § 228. Note aa.

<sup>q</sup> L. 3. § 2. ad. Leg. Falc. (35. 2.) L. 12. pr. C. de her. pet. (3. 31.) Nov. 2. c. 4. Nov. 22. c. 40. § 4. 7. Nov. 34. Buchholtz jurist. Abh. Nr. 23.

<sup>r</sup> R. Pol. O. 1530. Tit. 26. § 8. R. Pol. O. 1548. Tit. 17. § 8. R. Pol. O. 1577. Tit. 17. § 9. Tit. 20. § 6. [The translator is not sure that a perpetual annuity is what the author means.]



an inadequate compensation.\* This same rate of interest is made payable upon all debts contracted during the thirty years war.<sup>†</sup>

The above rule respecting annuities may be fairly extended by the *argumentum ab absurdo* to all cases in which interest is stipulated to be paid, but if this extension be deemed unwarrantable the following additional rules require to be stated :

1. Only in cases of purchases of annuities can 5 per cent. be made payable by agreement ; in all other cases the Canon law will apply, and consequently all interest must be deemed prohibited ;<sup>‡</sup>

2. Only in cases of loan is the rate of interest for deferred payment 5 per cent. ; all other transactions and breaches of duty for which interest might be payable fall within the absolute prohibition contained in the Canon law.

If, on the other hand it be held, in accordance with practice, that the law above referred to fixes 5 per cent. as the general rate of interest, whether payable by virtue of an agreement or otherwise,<sup>§</sup> then that law must be deemed to apply to those cases in which, by the Roman law 12 or 8 per cent. may be agreed to be paid, as also to those in which 12 per cent. is payable without any agreement, but not to cases of *nauticum fœnus*, for they are not purely cases of interest and do not come within the prohibition.<sup>¶</sup>

\* Dep. Absch. v. 1600. § 139.

† J. R. A. v. 1654. § 174.

‡ In the confusion which exists with respect to this, it has been forgotten that a law totally repealed does not come again into operation because some portion of it is re-enacted, see Savigny System B. 1. § 42. Note e. J. G. v. Meiern Ged. v. der Rechtmäss. d. 6ten Zinsthr. Hannov. 1732. and his Antwort auf die sogenannte Resultat. d. Meierschen Gedanken 1734. Hufeland Beiträge 1. Hft. Nr. 2. Hugo Civ. Mag. 2. B. Nr. 7. Danz Handb. d. D. priv. R. 2. B. § 204—206. Refutation der Meierschen Gedanken. Frkf. & Leipz. 1734. Gerstlacher Handbuch d. D. Reichsges. 10. B. 119. Weber über die nat. Verb. § 65. Nr. 3. Fritz Erläut. Hft. 3. p. 46—63.

§ Danz *loc. cit.* 205.

¶ See *contra* Leyser Sp. 244. m. 7. Wernher P. 6. Obs. 316. Schweppe R. Priv. R. 1. B. § 197. and in support of the text see Lauterbach Colleg. L. 22. T. 1. § 23. Hellfeld iurispr. for. § 1335. Hommel rhapsod. Obs. 718. Müller ad Leyser Obs. 438. and to some extent Stryk U. M. P. L. 22. T. 1. § 14. 15. But see Thibaut civilist. Abh. p. 122—124.

It is held by some that more than 6 per cent. may be promised to be paid in any transaction which is undertaken from mere liberality.<sup>a</sup>

§ 175.

In Germany many contracts very similar in their nature to interest contracts have become common; such are, for example, contracts relating to insurance and life annuities; as, however, such transactions are governed by laws purely German and are wholly independent of any principle of Roman law, this is not the place to treat of them.

§ 176.

**Interest limited by Capital.**—A second very important rule is, that accumulated interest exceeding in amount the capital on which it is payable (*ultra alterum tantum*) cannot be demanded.<sup>a</sup> The later laws which extend this rule to interest already paid are unglossed and do not extend to Germany.<sup>b</sup> The above rule, moreover, it is thought, does not apply—

1. To a debt owing to a town; <sup>c</sup>
2. To a case in which the debtor defers payment, and the creditor can show that repayment of the capital with an amount of interest equal to it does not afford sufficient compensation; <sup>d</sup> but this opinion seems unwarranted.

It is clearly erroneous to hold with some persons <sup>e</sup> that the rule now alluded to has ceased to be applicable at all; such a

<sup>a</sup> Wernher lect. comm. L. 22. T. 1. § 8. Müller l. c. Obs. 441.

<sup>b</sup> L. 26. § 1. de cond. indeb. (12. 6.) L. 9. pr. h. t. (22. 1.) L. 4. § 1. de naut. focn. (22. 2.) L. 10. C. de usur. (4. 32.). Generally I. P. de Ludewig de different. iur. R. et G. in usuris, praesert. ultra alt. tant. Hal. 1740. I. G. Langsdorf von den usuris ultra alter. tant. Manhem. 1778. W. Sell. Jahrb. B. 1. Nr. 2.

<sup>c</sup> L. 29. 30. C. de usur. (4. 32.) Nov. 121. 138. Pufendorf T. 1. Obs. 14. § 4. That the prohibition has now entirely ceased is the opinion of Glück Pand. 21. B. 106. 107.; but the Canon law and Roman law do not differ as to the prohibition of usury. See Voet Comm. L. 22. T. 1. § 19.

<sup>d</sup> There is no authority for this; but the unglossed Nov. 160 is usually thus understood.

<sup>e</sup> Müller l. c. Obs. 445. But see Vangerow Leitfaden § 571. Anm. 4.

<sup>f</sup> See Müller l. c. Obs. 443. and as agreeing with him on other grounds, Glück Pand. 21. B. 107—115.

doctrine is neither founded upon the pretended peculiarity of the German constitution, nor upon the ancient usage of the imperial courts. It is also erroneous to hold with others,<sup>f</sup> that interest must still be payable after it has equalled the amount of the principal if the interest is due by virtue of a judgment;<sup>g</sup> or if the debtor is guilty of fraudulent delay;<sup>h</sup> or if with his creditor's money he has bought something yielding profit;<sup>i</sup> or if he has to pay a yearly annuity by way of interest;<sup>k</sup> or if the contrary were agreed. It is not, however, denied that the principal may be more than doubled by the interest being paid and then re-lent as new capital;<sup>l</sup> but this is no exception to the rule in question.

### § 177.

**Compound interest.**—The last important rule is that compound interest (*anatocismus*) is illegal. The prohibition extends as well to agreements that unpaid interest shall be added to the original capital (*anatocismus conjunctus*), as to agreements that such interest shall be left in the hands of the debtor as an entirely new capital (*anatocismus separatus*). The present rule has no exception;<sup>m</sup> it applies even where by novation one creditor or debtor takes the place of another;<sup>n</sup> but it does not apply to cases in which in point of fact interest is not made payable on interest as;

1. Where, without any intention of fraudulently evading the

<sup>f</sup> Langsdorf *loc. cit.* cap. 1. Struben 1. B. 123. Bed. Pufendorf T. 1. Obs. 14. Wernher P. 8. Obs. 309. Mevius P. 7. Dec. 2. 3. 4.

<sup>g</sup> For this does not affect the nature of the *Obiecti litis*. L. ult. C. de usur. rei iudicatae (7. 54.). Lauterbach l. c. § 27.

<sup>h</sup> For usury laws ought even to prevent the ruin of bad citizens.

<sup>i</sup> We have only to ask whether a person who enjoys such profit is on that account to be under a liability limited only by the demand made against him.

<sup>k</sup> The ordinary reason given that here the capital is irredeemable is juridically speaking unsatisfactory.

<sup>l</sup> Hellfeld iurispr. for. § 1134.

<sup>m</sup> L. 23. C. de usur. (4. 32.) L. 3. pr. C. de usur. rei iud. (7. 54.) Meditat. über versch. R. M. 2. B. Nr. 63. Struben 5. B. 64. Bed. Berlich P. 2. Dec. 268. gives a number of exceptions on equitable grounds. But see H. de Cocceii de anatocismo. Sect. 5. (Exerc. T. 1. n. 87.). Franzke resol. L. 1. c. 10.

<sup>n</sup> L. 28. C. h. t. (4. 32.). Cocceii l. c. S. 2. § 2. 14. Cramer Obs. iur. un. T. 4. Obs. 1239. See *contra* Wernher P. 5. Obs. 16.

law, interest is in fact paid and then re-lent;<sup>o</sup> for by payment the character of interest is lost:

2. When one person has to pay interest on the debt of another:<sup>p</sup>

3. In cases of such annuities as do not in fact partake of the nature of a per centage;<sup>q</sup> but it is otherwise where a person relies on the pecuniary interest he can show himself to have in the matter in question.<sup>r</sup>

### § 178.

**Effect of usury.**—Usury being considered as forbidden by the Deity no one can renounce even by oath the protection thrown upon him by the laws which prohibit the taking of high rates of interest:<sup>s</sup> and all transactions serving as a cloak to usury are void.<sup>t</sup> Prepayment of interest is, unless made for usurious purposes, considered legal,<sup>u</sup> and only prevents the creditor from calling in his principal until the time for which such interest is payable has elapsed.<sup>x</sup>

If illegal interest has been paid, then;

1. If the debtor still has the principal and he has, whether knowingly or not, paid too high a per centage, the principal itself is by the payment of the excess *ipso jure* diminished;<sup>y</sup>

2. If by mistake more interest than is due is paid either at or after repayment of the principal, the excess can be recovered as

<sup>o</sup> Cocceii l. c. § 3. 4.

<sup>p</sup> L. 7. § 12. L. 9. § 4. d. de admin. tutor. (26. 7.). Mevius P. 6. Dec. 328. P. 8. Dec. 249. Struben 5. B. 56. Bed. See an anomalous case in Thib. Syst. § 806.

<sup>q</sup> Berlich l. c. n. 29. and some others except annuities entirely.

<sup>r</sup> H. de Cocceii Diss. cit. Sect. 4. § 5. see *contra* Berlich P. 2. Concl. 38. n. 33. cap. 6. X. de iureiur. (2. 24.) cap. 13. X. de usur. (5. 19.). R. Pol. O. 1577. Tit. 17. § 8. Cocceii l. c. S. 1. § 20.

<sup>s</sup> R. Pol. O. v. 1577. Tit. 17. § 8. Leyser Sp. 247. C. F. Walch de usurar. pravitate sub palliat. transact. Ien. 1773. Madihn Miscellen 1. Sch. Nr. 14. 15.

<sup>t</sup> Pufendorf T. 3. Obs. 68. Müller ad Leyser Obs. 486. G. J. F. Meister pract. Bemerk. 1. B. Nr. 2. Glück Pand. 21. 70—74.

<sup>u</sup> L. 57. pr. de pact. (2. 14.) L. 2. § 6. de dol. mal. et met. except. (44. 4.)

<sup>y</sup> L. 26. § 1. C. de usur. (4. 32.). A. B. Weber de usur. indeb. solut. (now in his Vers. 1. B. Nr. 4) § 23. Gottschalk dis. For. T. 3. nr. 32. Other modes of reckoning are supported by Leyser Sp. 245. m. 10. Müller l. c. Obs. 440. K. Röder Abhandl. Giess. 1833. p. 84.

money paid though not due.<sup>a</sup> From the general principles already adverted to (§ 79), it might be shown that the capital is *ipso jure* reduced by an intentional illegal payment of interest, and that any excess advisedly paid contrary to law after the return of the principal can be recovered back ;<sup>a</sup> but there are also special laws to this effect.<sup>b</sup>

The doctrines relating to the penalties incurred by breaches of the usury laws belong to Criminal Law.

### § 179.

**Mode of payment.**—Unless there be some stipulation to the contrary expressed or implied, interest is payable in *kind*, the same as the capital.<sup>c</sup> As interest is only an accessory no action lies for it if the action for the principal be extinguished, unless the duty to pay interest has some independent foundation, which is now considered to be the case if there be any contract for its payment.<sup>d</sup>

### § 180.

**Cessation of interest.**—The obligation to pay interest ceases ;

1. Upon payment, or that which is equivalent to payment, of the principal ;<sup>e</sup>

2. When the accumulated interest is equal in amount to the principal ;<sup>f</sup>

3. By the so-called *purgatio moræ* (§ 98), when the interest is payable on account of delay ;

4. By a release express or implied.<sup>g</sup> The last occurs when for

<sup>a</sup> L. 26. pr. § 2. de condit. indeb. (12. 6.).

<sup>b</sup> For usury is prohibited with a view to benefit debtors.

<sup>c</sup> L. 18. C. de usur. (4. 32.) cap. 6. X. de iureiur. (2. 24.) cap. 13. X. de usur. (5. 19.) Gottschalk disc. for. T. 3. nr. 32. Thibaut Vers. 2. B. 5. Abh. Nr. III.

<sup>d</sup> Leyser Sp. 243. m. 3. compared with Müller Obs. 483.

<sup>e</sup> L. 26. pr. C. h. t. (4. 32.). Mevius P. 3. Dec. 420. Struben 1. B. 63. Bed. Quistorp Beitr. n. 58. Noodt L. 3. c. 14. Archiv. für civilist. Praxis 1. B. Nr. 17. See *ante* § 156.

<sup>f</sup> L. 7. h. t. (22. 1.) L. 19. C. h. t. (4. 32.).

<sup>g</sup> See *ante* § 176. Note a.

<sup>h</sup> L. 17. § 1. de usur. (22. 1.).

several years (but for how many is nowhere stated) the debtor has paid less than the stipulated amount of interest, for then he need only in future pay as much as he has been accustomed to pay.<sup>b</sup> If a debtor is unable to pay interest in consequence of being arrested, the creditor suffers if he has himself unlawfully occasioned the arrest, but otherwise the debtor is not excused unless upon the grounds explained in § 96 when treating of delay.<sup>i</sup>

## F. INTERUSURIUM.

### § 181.

**Discount.**—*Interusurium*,<sup>k</sup> or *commodum representationis*,<sup>l</sup> is different from interest. When a debtor pays with the assent of his creditor a debt before it is due and that debt bears no interest, the debtor may require to be allowed something by way of discount for the advantage thus accruing to the creditor. This allowance for early payment (*representatio*) is termed *Interusurium*. The amount of allowance upon which the debtor can insist is much disputed. According to Pinkard<sup>m</sup> and Carpzov,<sup>n</sup> the allowance is the customary rate of interest from the day of payment up to the day originally fixed for payment. According to Hofmann<sup>o</sup> the allowance is the difference between the whole amount which the debtor would have paid on the day named, and

<sup>b</sup> L. 13. pr. l. c. L. 5. 8. C. eod. (4. 32.). Glück Comm. 21. B. p. 66—69. Hartitzsch prakt. Rechtsfragen. Leipz. 1840. Nr. 496. See *contra* Kritz Abh. über Materien des Civilrechts. Leipz. 1824. Nr. 3.

<sup>i</sup> For the different ideas see Struben 4. B. 102. Bed. Pufendorf T. 3. Obs. 170. Voet L. 22. T. 1. § 19. Müller ad Leyser Obs. 437. A. D. Weber Versuche III. § 7. Baumann comm. ad L. 13. de usuris. Lips. 1827. Gesterding alte u. neue Irrthümer. 2. B. Nr. 14. Unterholzner Verjährungslehre § 266—337. Schweppe R. Priv. R. 1. B. § 194.

<sup>k</sup> L. 66. pr. ad leg. Falc. (35. 2.) L. 9. § 8 de peculio (15. 1.) Fritz Erläut. Heft. 3. p. 128—138.

<sup>l</sup> L. 1. § 10. ad leg. Falc. (35. 2.) L. 1. § 2. 12. L. 2. § 1. de dote prael. (33. 4.) L. 24. § 2. sol. matr. (24. 3.).

<sup>m</sup> C. H. Horn de interusurio § 13.

<sup>n</sup> Carpzov P. 3. Dec. 275.

<sup>o</sup> G. A. Hoffmann app. prud. oecon. P. 1. p. 383. Von richtiger Berechn. des Interusurii. Leipz. 1735. J. H. W. Kirchhoff de commodo repraesentationis Sundiac. Vangerow Leitfaden B. 3. § 587.

that sum which, with simple interest for the intervening time, equals that amount (*interusurium simplex*). But neither of these principles of reckoning can be adopted. The only principle which is correct, at least theoretically and in general,<sup>p</sup> is that stated by Leibnitz,<sup>q</sup> according to whom the debtor is entitled to deduct the difference between the whole amount which he would have paid on the day named, and that sum which, with *compound* interest for the intervening time, equals that amount. There is here evidently no infringement of the law which prohibits the taking of compound interest (§ 177).<sup>r</sup> Some persons consider that both Hofmann's and Leibnitz' principles are correct, each according to circumstances.<sup>s</sup>

<sup>p</sup> L. 3. § 2. L. 88. § 3. ad L. Falc. (35. 2.) contain refined distinctions for two cases. From one of them a rule which favours Hofmann's view may be historically deduced. Schrader civil. Abh. 2. Abthl. 147—190. Seuffert Erört. einz. Lehren Abth. 1. Nr. 19. F. Zachariä über die richtige Berechnungsart des Interusurii. Greifsw. 1831. has, by some confused ideas regarding *Anatocismus*, come in effect to the same conclusion.

<sup>q</sup> G. G. Leibnitz medit. iurid. math. de interusurio, in Act. erud. ann. 1683. p. 425. Weiske Rechtslexikon B. 5. 636.

<sup>r</sup> A. G. Kaestner progr. pro iustit. calculi interusur. Leibnit. Lips. 1747. Deutsches Museum 1783. 9. 10. St. Hommel Rhaps. Obs. 306. E. A. Lieben Gedanken über d. Frh. v. Leibnitz und Hofmann's verschiedene calculos interusurii. Dresd. 1788. C. Zimmermann über Anatocismus und Interusurium. Frkf. 1797. Nr. 48—133.

<sup>s</sup> I. M. Schneidt Spec. arithm. ad mater. de usuris, antichresi, interusurio et reddit. ann. applicat. Herbip. 1784.

## CHAPTER IV.

## OF THE FOUNDATION OF RIGHTS AND DUTIES.

## DIVISION I. OF THEIR CREATION AND EXTINCTION OTHERWISE THAN BY PRESCRIPTION.

## I.—THEIR CREATION.

## 1. Mediate and Immediate rights and duties.

## § 182.

RIGHTS and obligations can only arise by virtue of something external to the law.<sup>1</sup> As a general rule they do not arise in the absence of an exercise of will in some transaction, bilateral or unilateral, legal or illegal; but a right or a duty may be annexed by law to some other kind of event.<sup>2</sup> If the foundation of a right or a duty be some event which cannot be expressed by any special technical word, the right or duty is said to be immediate, or simply *ex lege*, all other rights and duties being termed mediate.<sup>3</sup> This division is, however, becoming less and less precise,<sup>4</sup> as is also the corresponding division, founded upon it, of actions into *dative* and *native*.<sup>5</sup> In this portion of the work the general doctrines only which relate to expressions of will can be properly investigated.<sup>6</sup>

<sup>1</sup> I. O. Westenberg de caussis obligat. (op. T. 2. n. 3.).

<sup>2</sup> See for example Tit. I. de oblig. quae quas. ex. contr. (3. 27.) Tit. I. de obl. quae quas. ex delict. (4. 5.).

<sup>3</sup> L. 1. pr. L. 52. pr. § 5. de O. et. A. (44. 7.). Thibaut Vers. 1. B. Nr. 12. & 2. B. p. 25. 26. Unterholzner Schuldverhältnisse B. 1. § 12.

<sup>4</sup> Meurer jur. Abh. u. Beob. 1. S. Nr. 1. Weber über nat. V. § 30—32.

<sup>5</sup> I. A. Frommann collatio act. dativarum cum nativis. Tub. 1683.

<sup>6</sup> Some of these doctrines more properly belong to the general principles respecting contracts; see the *System* § 368—434.



## 2. Legal transactions.

### § 183.

**Formal, informal.**—Expressions of will from which legal relations arise, are termed legal events or transactions.<sup>b</sup> If they are required by law to be in a particular form, they are said to be formal (*legis actio* in the old civil process, and generally *actus legitimus*).<sup>c</sup> In certain formal transactions agency was not by the Roman law allowed, nor could any condition or limitation of time be annexed to them.<sup>d</sup> To such is the expression *actus legitimi* more particularly confined. In some of these transactions (as in successions by heirs) agency was not allowed, simply because the name of the principal himself had to be inserted in the formula, and the peremptory exclusion of conditions and limitations of time also arose from the pertinacity with which old forms were adhered to. Nevertheless, in other cases (as in the appointment of Guardians) these doctrines are reasonably explicable from the very nature of the transaction.<sup>e</sup>

### § 184.

In every transaction it is necessary to distinguish between its essential, usual and unusual constituent parts (*essentialia, naturalia, accidentalia*). The want of the first renders the transaction void. Both the latter may be absent; but the absence of the usual or presence of unusual parts will never be presumed.<sup>f</sup> A complete expression of will is an essential constituent part of every transaction.<sup>g</sup>

<sup>b</sup> There are many definitions, see v. Buchholtz jurist. Abh. Nr. 9. Schilling Instit. B. 2. § 69.

<sup>c</sup> Gaii inst. I. 184. IV. 12—31. 95. 108. L. 123. pr. de R. I. (50. 17.) compared with L. 77. eod. L. 21. C. de haeret. (1. 5.). Dirksen Beiträge Nr. 4. Dupont in commentarium IV. Gaii. Lugd. Bat. 1822.

<sup>d</sup> L. 77. de R. I. (50. 17.) Vatican. Fragm. § 329.

<sup>e</sup> Compare Maranus C. ad L. 77. de R. I. (op. T. H.). Alciat parerg. L. 3. c. 4. Cuicacii obs. L. 15. c. 16. Ritter ad Heineccii histor. iur. L. 1. § 46. J. G. Bauer de actib. legitimis. Lips. 1748. (opusc. T. 1. n. 14.). Höpfner de legis actionibus et actibus legitimis (appx. to his commentary).

<sup>f</sup> L. 27. § 3. de pact. (2. 14.) L. 6. § 1. L. 11. § 1. de act. E. V. (19. 1.) L. 3. de R. C. (12. 1.) L. 72. de contr. empt. (18. 1.). Averanii int. L. 4. c. 12. n. 12—28.

<sup>g</sup> L. 25. qui test. fac. poss. (28. 1.) L. 9. C. eod. (6. 22.). H. de Cocceii de iure circa actus imperfectos. Frkf. ad V. 1699. Vinnii qu. sel. L. 2. c. 17.

## § 185.

The existence of any transaction as a matter of fact requires proof, and if the transaction consists of several others, each one must be separately proved.<sup>b</sup> If the essential parts of a transaction be satisfactorily proved and established generally, the observance of the requisite legal forms will be presumed.<sup>c</sup>

## § 186.

Every transaction must, in cases of doubt, be in its proper legal form, otherwise it will be invalid.<sup>d</sup> The invalidity, however, of one transaction does not extend to others in which the requisite legal forms are duly observed,<sup>e</sup> unless the latter are only accessory transactions depending on the essential parts of the first, or unless the existence of the first be absolutely necessary to that of the others; for in neither of these cases do the doctrines of conversion (§ 80) apply.<sup>f</sup> On grounds of manifest equity a judge may dispense with the exact observance of legal forms in all those cases in which such forms are not imposed for the express purposes of protection (as is the case in testaments, &c.)<sup>g</sup> The invalidity of a transaction continues<sup>h</sup> until some new event renders the transaction valid.<sup>i</sup>

## § 187.

**Of present assent.**—There are four kinds of will in a judicial sense, viz.:

<sup>b</sup> L. 13. § ult. de public. in rem act. (6. 2.). S. Gentilis de solennitat. quaten. in quoque act. intervenire. deb. vel interesse praesum. Nor. 1617. Menoch de praesumpt. L. III. pr. 132.

<sup>c</sup> Compare § 8. I. de fideiussor. (3. 20.) L. 30. de V. O. (45. 1.) L. 14. C. de contr. stipulat. (8. 38.) L. 25. pr. de adopt. (1. 7.). Weber v. der Beweisführung VI. n. 30. 31.

<sup>d</sup> Ante § 79. 80.

<sup>e</sup> L. 29. de usur. (22. 1.) L. 34. pr. L. 36. § ult. C. de donat. (8. 54.) L. 2. 5. 7. 8. C. de inoffic. don. (3. 29.).

<sup>f</sup> L. 27. fam. here. (10. 2.) L. 7. § 1. de recept. arbitr. (4. 8.) L. 1. C. de posth. hered. inst. (6. 29.).

<sup>g</sup> L. 183. de R. I. (50. 17.). Compare Müller ad Leyser Obs. 5.

<sup>h</sup> § 1. 2. I. de inutil. stip. (3. 19.) L. 83. § 5. de V. O. (45. 1.). Averan. interpr. L. 4. c. 22.

<sup>i</sup> L. 1. pr. de reg. Caton. (34. 7.) L. 42. de usurp. (41. 3.) L. 4. § 32. de doli

1. Express, when evidenced by word of mouth, by writing,<sup>q</sup> or by gesture;<sup>r</sup>

2. Tacit, when evidenced otherwise;<sup>s</sup>

3. Presumed, when the existence of the will is not proved but is probable on general grounds;<sup>t</sup>

4. Fictitious (*consensus fictus*), when the will being neither proved nor presumable,<sup>u</sup> is nevertheless treated as existing.<sup>x</sup>

#### § 188.

No general rule can be given for the purpose of ascertaining the existence of a tacit will,<sup>y</sup> but each case must depend upon its own particular circumstances. It can only be stated generally that no certain determination of will can be inferred from an ambiguous transaction,<sup>z</sup> and that if only one construction can be put upon it, the person whose will is in question, can avoid the consequences which would attach to his assent (but of course not a liability attaching on other grounds) by protesting that he does not in fact mean that which *prima facie* might be supposed.<sup>a</sup>

#### § 189.

Presumed consent being uncertain, cannot, as a general rule, give rise to any juridical relation unless there be some special law

exc. (44. 4.) L. 4. 27. 65. § 1. de Ritu (23. 2.) pr. I. de nupt. (1. 10.). Savigny System B. 4. § 203.

<sup>q</sup> L. 38. de O. et A. (44. 7.).

<sup>r</sup> L. 52. § 10. eod. L. 17. de novat. (46. 2.) L. 21. pr. de legat. 3. (32.) L. 1. § 3. de adsign. lib. (38. 4.).

<sup>s</sup> R. T. Heyne de voluntatis tacite patefactae et praesumtae vi. Dresdae 1840. Savigny System B. 3. § 131. 132.

<sup>t</sup> Schilling Instit. B. 2. § 86.

<sup>u</sup> L. 4. pr. L. 7. pr. in quib. caus. pign. tac. (20. 2.).

<sup>x</sup> L. 6. eod. L. 21. C. de procurat. (2. 13.). Weber über die nat. Verb. § 24. Savigny System B. 3. § 133.

<sup>y</sup> L. 8. § 1. de procur. (3. 3.) L. 16. de SCto Maced. (14. 6.) L. 2. § ult. solut. matrim. (24. 3.) L. 2. pr. ad municip. (50. 1.) L. 1. C. de filiisfam. (10. 60.). Noodt de pact. cap. 2. (Op. T. 1.) J. G. B. Härlin v. d. stillschweigenden Einwilligung. Tübing. 1814.

<sup>z</sup> L. 2. § 1. L. 3. 4. 57. pr. de pact. (2. 14.). Struben 1. B. 107. Bed.

<sup>a</sup> Müller ad Leyser Obs. 572.

to that effect. But it is an important, though not a universal,<sup>b</sup> rule, that consent may be presumed when one person conducts the affairs of another who does not dissent, and when a person knowingly allows that to happen which it is his duty to prevent;<sup>c</sup> but, of course, the person whose will is thus presumed must be capable of attending to his own affairs.<sup>d</sup>

### § 190.

**Ratihabition.**—A transaction invalid at first may become valid by the subsequent approval (*ratihabition*) (§ 80) of him who is or becomes capable of ratifying it.<sup>e</sup> By a valid *ratihabition* an invalid transaction is as a rule<sup>f</sup> so strengthened that it is to be deemed valid from the very first;<sup>g</sup> but the nature itself of a transaction unilateral at its commencement is not changed, even although the approving party may be as unable to contest the validity of that which he has ratified as if he had originally consented to it.<sup>h</sup> Confirmation by the supreme power of a state may be regarded as a sort of *ratihabition*, but does not, in cases of doubt, alter the nature of the confirmed transaction.<sup>i</sup>

<sup>b</sup> L. 142. de R. I. (50. 17.) cap. 43. de R. I. in 6. (5. 12.). H. de Cocceii de silentio (Ex. T. 1. n. 43.). H. Brokes Obs. 6. Cramer de tacente consentiente (Op. T. 2.). Glück Rechtsf. 2. B. Nr. 27. Götz Beitr. 2. B. 4. St. Nr. 26.

<sup>c</sup> L. 5. C. ad Sct. Vellei. (4. 29.) L. 6. § 2. L. 18. mandati (17. 1.) L. 7. § 1. L. 12. pr. de sponsal. (23. 1.) L. 12. de evict. (21. 2.) L. 38. § 1. de donat. int. V. et U. (24. 1.) L. 60. de R. I. (50. 17.). See too Savigny System B. 3. § 132.

<sup>d</sup> L. 110. § 2. de R. I. (50. 17.) L. 3. § 2. de tribut. (14. 4.).

<sup>e</sup> But not for example when the period for the transaction is expired, L. 24. pr. ratam rem hab. (46. 8.).

<sup>f</sup> For exceptions see L. 4. § 6. de offic. proc. (1. 16.) L. 65. § 1. de R. N. (23. 2.), which can be well explained by the nature of the *jus publicum*. Mühlenbruch Pand. B. 1. § 100.

<sup>g</sup> L. 7. C. ad Sct. Mac. (4. 28.) L. 25. C. de donat. int. V. et U. (5. 16.). See *contra* Hufeland Geist d. R. R. 1. B. 199—227. Glück Pand. 17. B. § 1026. Fritz Erläuterungen 1. Hft. 203—205.

<sup>h</sup> L. 9. de neg. gest. (3. 5.) L. 20. § 1. mandat. (17. 1.) L. 60. de R. I. (50. 17.) L. 3. C. de R. V. (3. 32.) L. 20. C. fam. herc. (3. 36.) L. 3. C. de contr. stip. (8. 38.). But see C. T. Welcker ad L. 9. de negot. gest. Giess. 1813.

<sup>i</sup> L. 1. § 2. de reb. eor. (27. 9.) cap. 1. 3. 4. X. de confirm. (2. 30.). Mevius P. 1. Dec. 6. P. 7. Dec. 232. Arch. f. civ. Prax. 4. B. Nr. 17.

## II.—EXTINCTION OF RIGHTS AND DUTIES.

## § 191.

Rights and duties considered with reference to their duration are governed by the fundamental rule that they continue to exist until some special circumstance arises which causes them to cease, and that they then cease so far only as is rendered necessary by such circumstance. As moreover rights may be exercised in more ways than one, actively or passively, another fundamental rule is that a person who by agreement or law has lost only his liberty to sue is not thereby deprived of the other modes of exercising or enforcing his right.<sup>k</sup> But it is specially declared that when a law, framed only for the benefit of debtors, deprives the creditor of his power of suing his debtor,<sup>l</sup> or gives to the debtor a defence to an action brought by his creditor, the whole of the latter's right is extinguished.<sup>m</sup> These rules were not however logically carried out to their full extent by the Romans.<sup>n</sup>

## § 192.

According as the destruction of a right is entire or partial is its correlative duty utterly gone or only limited (*nulla, reprobata* or *restricta*). A duty which is so utterly gone as to be deemed in strictness of law not to exist at all is termed *ipso jure nulla*; a duty which is only destroyed in so far as the person obliged can shield himself from a strictly legal claim by an equitable plea (*ope exceptionis*) is termed *inefficax*.<sup>o</sup>

<sup>k</sup> Weber über die natürliche Verbindlichkeit. § 91. 92.

<sup>l</sup> L. 40. mandati (17. 1.) L. ult. C. de neg. gest. (2. 19.).

<sup>m</sup> L. 26. § 3. 7. L. 40. pr. L. 43. L. 54. L. 56. de condiet. indeb. (12. 6.) L. 9. § 4. ad Sct. Maced. (14. 6.) L. 112. de R. I. (50. 17.) L. 9. C. ad L. Falcid. (6. 50.). Compared with L. 7. § 4. de pact. (2. 14.). But see Francke civilist. Abhandl. Gött. 1826. p. 65—78. In cases of doubt the defence is deemed to be allowed for the benefit of the debtor. K. Büchel civilrechtl. Erört. Marb. 1832. 1. Hft. 25. See *contra* Guyet im Archiv f. civil. Prax. 11. B. 78. Compare Kierulff Theorie B. 1. 185. 186. Not.

<sup>n</sup> L. 5. L. 9. L. 33. de cond. indeb. (12. 6.) L. 49. § 1. de fideiussor. (46. 1.). Glück Pand. 13. B. § 828. Voet Comm. L. 12. T. 6. § 4. 17. L. de Pfordten de obl. civilis in naturalem transitu. Lips. 1843. § 8. 9.

<sup>o</sup> *Ante* § 8. L. 13. de iure dot. (23. 3.). Savigny System B. 4. § 202. Sintenis Civilrecht B. 1. § 24.

§ 193.

**Causes of destruction.**—Rights and duties which have once really arisen continue to exist, and even new circumstances under which they could not have arisen do not destroy them unless such circumstances render their enforcement impossible.<sup>p</sup> According to general principles a legal relation (*Rechtsverhältniss*) is only destroyed by performance or its equivalent,<sup>q</sup> or by new circumstances which are inconsistent with its continuance.<sup>r</sup>

**III.—PRESERVATION OF RIGHTS AND DUTIES.**

§ 194.

If a person is apprehensive of losing a right by any event it may be advisable and necessary for him to protect himself either by protesting against a prejudicial interpretation of the event or by reserving his right.<sup>s</sup> If the event has by law certain necessary results they will ensue notwithstanding protestation;<sup>t</sup> but if they flow from a conclusion drawn from the meaning of the transaction protestation will be effectual. Even in this case, however, no person can by protesting save himself from the consequences of his own free illegal act.<sup>u</sup>

*DIVISION II. OF THE CREATION AND EXTINCTION OF RIGHTS AND DUTIES BY PRESCRIPTION.*

**I.—GENERAL NOTION OF PRESCRIPTION.**

§ 195.

A right, by virtue of its very nature, may be exercised or not without giving rise to any duty whether active or passive; but to

<sup>p</sup> § 2. I. de inutil. stip. (3. 19.) L. 140. § 2. de V. O. (45. 1.) L. 85. § 1. de R. I. (50. 17.). Averanii int. L. 4. c. 24.

<sup>q</sup> Thib. Syst. § 577.

<sup>r</sup> L. 35. de R. I. (50. 17.). Sinenis Civilrecht B. 1. § 25.

<sup>s</sup> L. 34. de neg. gest. (3. 5.) L. 14. § 7. de religios. (11. 7.). I. Strauch de protestation. Ien. 1668. S. Stryk de iure reservationum. Frkf. 1689. I. B. Wernher de reservato. Vit. 1726. Sinenis Civilrecht B. 1. § 18. Note 26.

<sup>t</sup> L. 14. de publ. in rem act. (6. 2.). C. Thomasius de protestatione ius protestantis non conservante. Hal. 1699. Idem de protestatione facto contraria. Hal. 1699. Waldeck Controversenentscheidungen 1. Thl. 155—171.

<sup>u</sup> L. 21. pr. de acquir. vel om. hered. (29. 2.). Müller ad Leyser Obs. 572.

this there may nevertheless be exceptions founded on legal grounds.

If a right ceases to be exercisable merely because the encroachments of others have not been withstood, or because such right has not been exercised within a certain time, the right is said to be lost by prescription *præscriptio*\* (the word being here used in its widest sense).<sup>y</sup>

Prescription is in general the direct consequence of some law (*præscriptio sensu stricto v. legalis*), but it may be founded upon a judicial decision, a will, or an agreement (*præscriptio judicialis, testamentaria, conventionalis*).<sup>z</sup> The time which must by law elapse before a right can be lost by prescription cannot of course be varied by any judicial decision, but may be either enlarged or confined by will or agreement if the rights of third persons are not thereby affected. A judge therefore cannot *ex officio* declare a right lost by mere lapse of time; *præscriptio longissimi temporis* (§ 203), is incapable of being enlarged and must be officially noticed by a judge even if unasked.<sup>a</sup>

\* This unroman designation has originated from L. 2. L. 7. C. ne de statu (7. 21.) L. 1. § 4. eod. (40. 15.) L. 1. C. de bon. matern. (6. 60.).

<sup>y</sup> For the history of these doctrines see F. C. Conradi hist. usuc. et longi temp. praeser. (in his triga lib. quib. iur. usue. illustr.) Lips. 1728. Galvanus de usufr. c. 11. 12. C. H. Gros Gesch. d. Verj. nach R. R. Gött. 1795. For the law see Eustathius de temporum intervallis; ex edit. Teucheri; ed. 2. Lips. 1815, by E. Zachariä. Heidelberg 1836. Groslotius de usucap. (Otto Thes. T. 5.). I. Ravii princ. univ. doct. de praeser. c. not. Eichmann. Hal. 1790. I. L. Schmidt op. de praeser. praesert. circa pignus. Ien. 1780. Opp. T. I. E. C. Westphal Syst. des R. R. über die Arten der Sachen. Leipz. 1788. § 497—839. Thibaut Schr. über Besitz und. Verj. Th. 2. 2. Aufl. Jena 1838. Dabelow über d. Verjährung. Halle 1805. 1806. 2. B. 8. A. S. Kori Theorie der Verjährung nach gemeinen und sächsischen Rechten. Leipz. 1811. 8. K. A. D. Unterholzner die Lehre v. d. Verjährung durch fortgesetzten Besitz. Bresl. 1815. Die gesammte Verjährungslehre. Leipz. 1828. 2. B. 8. K. F. Reinhardt die usucapio u. praescriptio des Röm. R. Stuttgart 1832. Savigny System B. 4. § 177. 178.

<sup>z</sup> S. Stryk de praeser. convent. ad L. Aemilius 38. de minoribus.

<sup>a</sup> L. 31. § 22. de aedil. edict. (21. 1.) L. 2. C. de pact. int. emt. et vend. (4. 54.) L. 3. 4. C. de praeser. 30. ann. (7. 39.). For the various interpretations put upon these passages see Rave § 167. Kori § 47. Archiv für civilist. Praxis 1. B. Nr. 28. 29. 10. B. p. 77—80. Pfeiffer pract. Ausföhr. 1. B. Nr. 2. Unterholzner 1. B. § 28. 138. Linde Zeitschr. 2. B. 190—192.

§ 196.

**Sorts of prescription.**—Prescription is divided with reference to the right acquired into *extinctiva* and *acquisitiva*, according as such right is the simple consequence of the extinguishment of a right of another person or is something more.

The latter kind of prescription is again divided into *translativa* and *constitutiva*, according as the right acquired is the whole of the right of the person prescribed against or some other right merely opposed to it. *Præscriptio translativa* is usually itself divided; for in some cases a right is lost by mere non user, but in other cases only when something, inconsistent with its exercise, is done by others (*usucapio libertatis*); in the former case there is what is termed *extinctio juris per non usum*, and in the latter *præscriptio extinctiva in specie*.<sup>b</sup>

II.—IMMEMORIAL PRESCRIPTION.

§ 197.

Legal prescription, of which several sorts still require notice, is perfected in various periods of time. A person who has not the capacity to acquire an advantage by the lapse of these periods is protected by what is called immemorial prescription (*pr. immemorialis v. indefinita*); the term immemorial being used to denote that the time required to elapse is indefinite, and not, as in ordinary cases of prescription, a fixed and definite period (*præscriptio definita*). Immemorial prescription<sup>c</sup> rests upon the

A. G. Schroeter de temporis vi in actionibus et interdictis tollendis. Ien. 1827.

<sup>b</sup> L. 18. C. de postlim. (8. 51.). See generally A. L. Hombergh zu Vach de præscriptione extinctiva cum interitu iurium per non usum haud confundenda. Marb. 1750. B. W. Pfeiffer vermischte Aufsätze. Marb. 1803. p. 272—341.

<sup>c</sup> See A. Ockel de præscript. immemoriali. Alt. 1683. Halae 1707. H. de Cocceii de præscript. immemor. Heidelb. 1706. (Exerc. T. 1. n. 39.). I. P. Kress de genuina natura et indole vetustatis. Helmst. 1734. & 1749. G. C. Neller idea præscr. immemorialis (op. P. 1. T. 3.). Pufendorf T. 1. Obs. 151. Neustetel & Zimmern Unters. 1. Bd. Nr. 5. 6. Kritz Abhandl. über Materien des Civilrechts. Leipz. 1824. 146—231. B. W. Pfeiffer pract. Ausfuhr. 2. B. Nr. 1. Peculiar views are entertained by Dabelow 2. Bd. § 110—125. *Contra* Kori



principle, recognised both by law and uniform practice,<sup>d</sup> that he who has been beyond the memory of man in the same uninterrupted state must, solely on that account, be regarded and treated as if he had acquired a right to be in that state by means of some valid transaction. Consequently it follows, that—

1. All rights capable of being acquired at all, (although perhaps not by definite prescription) may be acquired, even without any title,<sup>e</sup> by immemorial prescription,<sup>f</sup> provided only they have been uninterruptedly exercised as rights.<sup>g</sup>

The existence of the necessary state of things must if disputed<sup>h</sup> be proved. If the testimony of witnesses is relied upon they must be old, that is, according to the common opinion, not younger than fifty-four,<sup>i</sup> and they must prove that to their own knowledge the state of things has always existed as alleged, and that they never heard from their forefathers that they had knowledge of another and inconsistent state of things.<sup>k</sup> Even the *juramentum delatum* is admissible,<sup>l</sup> and documents ought not to be rejected<sup>m</sup>

§ 85. Unterholzner gesammte Verjährungslehre B. 1. § 140—150. § 299, 300. P. H. J. Schelling v. d. unvordenkl. Zeit. München 1835. Arndt's Beiträge. Bonn 1837. Nr. 3. H. Buehka der unvordenkl. Besitz. Heidelb. 1841. Schmidt v. Ilmenau civ. Abb. B. 1. Jena 1841. Nr. 3. A. Friedländer die Lehre v. d. unvordenkl. Zeit. Marb. 1843. 1844.

<sup>d</sup> L. 3. pr. de loc. et itin. publ. (43. 7.) L. 3. § 4. de aqua quot. (43. 20.) L. 1. § 23. L. 2. pr. § 1. 3. 7. 8. L. 23. § 2. L. 26. de aqua et aquae pluv. (39. 3.) cap. 26. X. de V. S. (5. 40.) cap. 1. de praeser. in 6. (2. 13.) Gold. Bulle Tit. 8. § 1. 2. 5. 27. Tit. 28. § 5. Westph. Fr. Art. 4. Art. 9. § 2. Art. 15. § 2. R. A. v. 1548. § 56. 59. 64. R. A. v. 1576. § 105. As to the practice see Unterholzner 1. B. 524—526. Pfeiffer *loc. cit.* 80—95. Savigny System B. 4. § 195—201. limits its application to public law.

<sup>e</sup> *Bona fides* is requisite as it has been considered by the Popes a *praescriptio*. Pfeiffer *loc. cit.* 28—35. Compare Savigny *loc. cit.* § 200 near the end.

<sup>f</sup> Thibaut's above mentioned essay, Th. 2. § 75—79. For an exception see Concil. Trident. Sess. 24. cap. 1.

<sup>g</sup> L. 28. de probat. (22. 3.). Thibaut *loc. cit.*, § 80—83.

<sup>h</sup> Savigny *loc. cit.* § 201. near the end.

<sup>i</sup> C. A. Weiske quaest. iuris civilis. Zwickau. 1831. nr. IV. But see Savigny *loc. cit.* § 200.

<sup>k</sup> Thibaut *loc. cit.* § 84.

<sup>l</sup> Pufendorf T. 2. Obs. 55. This is denied by some. Pfeiffer *loc. cit.* 59—67. Günther princ. iur. Rom. T. 1. § 330.

<sup>m</sup> Savigny *loc. cit.*

whether they are adduced for the purpose of supporting witnesses or without reference to them ; but in the latter case it must appear from the documents that the alleged state of things has actually existed for the two preceding generations. The evidence to be opposed to this must go to show either that the state of things has not existed beyond the memory of man or has not been uninterrupted.<sup>a</sup> There can be no question here of any *interruptio civilis* (§ 199) or of any restoration of a previously existing state of things.<sup>o</sup>

### III.—DEFINITE PRESCRIPTION AND ITS REQUISITES.

#### 1. ACQUISITIVE.

##### A. A LAW.

##### § 198.

There can be no legal definite prescription, whether to acquire or extinguish, without some express law. For conclusions drawn by analogy are inadmissible on account of the singular (§ 34) nature of the provisions relating to this matter ;<sup>p</sup> and as it is nowhere declared generally that all rights can be acquired by definite prescription each individual case must be shown to come within some specific law.

##### B. POSSESSION.

##### § 199.

Secondly, it is requisite that there be a continuous uninterrupted enjoyment of the positive or negative right prescribed for ;<sup>q</sup> and the right must be exercised by a person claiming it as his own.<sup>r</sup> There can then be no prescription if the right prescribed against has been in any manner exercised by the person in whom it resides,<sup>s</sup> or if the person prescribing has acknowledged the

<sup>a</sup> Opinions however differ as to this. Pfeiffer *loc. cit.* 67—80.

<sup>o</sup> Pfeiffer *loc. cit.* 20—28. 95—98. Savigny *loc. cit.* § 201.

<sup>p</sup> Thibaut *Schrift über Besitz und Verj.* 2. Thl. § 37. 38.

<sup>q</sup> L. 25. de usurp. (41. 3.) L. 20—25. quem. serv. amitt. (8. 6.). See Unterholzner v. d. Verj. §. 49. 58.

<sup>r</sup> L. 1. C. commun. de usuc. (7. 30.) L. 3. § 23. de A. v. A. P. (41. 2.) L. 5. C. in quib. caus. cess. l. t. pr. (7. 34.) L. 2. C. de praeser. 30 vel 40 ann. (7. 39.).

<sup>s</sup> L. 18. de S. P. R. (8. 3.) L. 9. § 1. si serv. vindic. (8. 5.) L. 2. quem. serv. am. (8. 6.)

existence of that right and his own duty;<sup>1</sup> but a divisible right may by partial non-user be partially lost by prescription.<sup>2</sup> Consequently, even without any *accessio possessionis* (§ 221), the possession necessary to confer a right by prescription is interrupted, by the non-continuance in the possessor of the conditions essential to possession (*usurpatio, interruptio naturalis*),<sup>3</sup> and therefore also if he be ousted, or if the thing be either physically or legally destroyed, or if he intentionally abandons his right of detention, or has recognised the right of his opponent, &c.<sup>4</sup> On the other hand possession is not interrupted by the mere co-possession of another,<sup>5</sup> nor by a protest whether judicial or extra-judicial, nor by express notice;<sup>6</sup> but as to this last there is an exception in cases of quasi-possession (§ 229), inasmuch as that cannot exist without forbearance on the part of him against whom it is used.<sup>7</sup> An *interruptio civilis*, i.e. where possession continues, but the capacity to prescribe is lost by some judicial proceeding, only occurs where the person prescribing is absent and a proper protestation is lodged against him.<sup>8</sup>

### C. LAPSE OF TIME.

#### § 200.

Thirdly, it is requisite that the appointed period of time should have expired. This period is in general deemed continuous (§ 95), and is reckoned up to the very last moment of the last day.<sup>9</sup>

<sup>1</sup> L. 7. § 5. 6. L. 8. § 4. C. de praeser. 30 vel 40 ann. (7. 39.).

<sup>2</sup> L. 14. 20. 25. quib. mod. ususfr. amit. (7. 4.).

<sup>3</sup> Vangerow Leitfaden § 323. Anm. 1.

<sup>4</sup> L. 29. de pignor. act. (13. 7.) L. 5. L. 21. L. 33. § 4. 5. h. t. (41. 3.) L. 5. pro don. (41. 6.) L. 7. § 5. C. de praeser. 30 vel 40 ann. (7. 39.).

<sup>5</sup> L. 12. pro emt. (41. 4.).

<sup>6</sup> L. 13. eod.

<sup>7</sup> L. 1. § 5. 6. 7. L. 20. § 1. quod vi (43. 24.) L. 2. C. de servit. (3. 34.) L. 2. C. de praeser. l. t. (7. 22.). Kori § 166—169. Langenn & Kori Erört. 2. B. Nr. 10.

<sup>8</sup> L. 14. § 4. C. de n. n. pec. (4. 30.) L. 2. C. de annal. except. (7. 40.). See further as to this, Löhr Magazin B. 4. 379—382. 402.

<sup>9</sup> L. 6. L. 7. L. 31. § 1. de usurp. (41. 3.) L. 15. pr. de divers. temp. praeser. (44. 3.) L. 6. de O. et A. (44. 7.) Erb in Hugo C. M. 5. Bd. Nr. 8. Löhr im

D. DONA FIDES.

§ 201.

By the Canon law<sup>c</sup> it is further necessary that the person prescribing should in every case of prescription conduct himself with bona fides during the whole period of time.<sup>f</sup> The bad faith of an agent prejudices, but his good faith does not assist his principal:<sup>g</sup> and even ignorance of law is treated as *mala fides*.<sup>h</sup> In case of a succession of persons a distinction must be drawn between a *successor singularis* and a *successor universalis* (§ 154). The possession of a *successor singularis* who acts in good faith is not affected by the bad faith of his predecessor; nor is the good faith of the predecessor of any avail if the *successor singularis* himself acts in bad faith.<sup>i</sup> A *successor universalis*, on the other hand, is by the Canon law always prejudiced by the bad faith of his predecessor; but good faith on the part of the latter is never of any avail for a *successor universalis* who himself acts in bad faith.<sup>k</sup>

Aroh. f. civil. Prax. 11. B. Nr. 18. Reinfelder der annus civilis. Stuttg. 1829. A. M. ist Unterholzner 1. B. § 86—90. Savigny System B. 4. § 183—185.

<sup>c</sup> By the Roman law it was otherwise; by it *bona fides* was only required at the commencement of the possession and in cases of sale until the conclusion of the contract. L. 8. C. de praescript. 30 vel 40 ann. (7. 39.) L. 10. pr. L. 15. § 2. 3. L. 44. § 1. L. 48. h. t. (41. 3.) L. 44. § 1. L. 48. h. t. (41. 3.) L. 2. § 13. L. 7. § 4. pro emt. (41. 4.). Donellus comm. L. 5. c. 25. Unterholzner 1. B. § 91—121. See however Möllenthal über die Natur des guten Glaubens. Erlang. 1820. p. 63.

<sup>f</sup> Cap. ult. X. de praeser. (2. 26.). Pufendorf T. 1. Obs. 115. T. 2. Obs. 194. Leyser Spec. 455. m. 8. Müller ad Leyser Obs. 724. But see with respect to the *extinctura*: Behmer ius nov. contr. T. 1. Obs. 8. L. Menken an requiratur b. f. in praeser. action. personalium. § 18, and as to the case where no *res aliena* is acquired: H. de Coccei de finibus b. f. in praescript. Diss. I. II. (Exerc. T. 1.). Wernher P. 1. Obs. 183. P. 3. Obs. 73. 94. 213. I. H. Boehmer I. E. P. T. 1. L. 2. Tit. 26. § 51—58. Möllenthal *loc. cit.* 111—152. C. Hildenbrand de bona fide rei propriae debitori ad temporis praescriptionem haud necessaria. Mogonti. 1843. See against him, B. W. Pfeiffer vermischte Aufsätze. Marb. 1803. 342—370. and Archiv für. civilist. Prax. 6. B. Nr. 18. W. Wolff Abh. aus dem bürgerl. R. Kassel 1840. Nr. 8.

<sup>g</sup> L. 43. § 1. h. t. (41. 3.) L. 2. § 10. 12. 13. pro emt. (41. 4.).

<sup>h</sup> L. 31. pr. L. 32. § 1. h. t. (41. 3.). Weber zu Höpfner § 396. Not. 2.

<sup>i</sup> L. 2. § 17. pro emtore (41. 4.) L. 5. pr. de divers. temp. praeser. (44. 3.) L. 4. C. de R. V. (3. 32.). Pfeiffer *loc. cit.* 364 is of a different opinion with respect to the first.

<sup>k</sup> Thibaut's above mentioned Schrift, § 21.

If, moreover, he who gains by completed prescription be not so placed that he must exert himself (as in cases of prescription by non user (§ 196)), he cannot, of course, be charged with bad faith merely because his opponent is negligent.<sup>1</sup> But this does not by any means apply to one who in consequence of the tardiness of his creditor does not give up that which such creditor is himself bound to fetch (Syst. § 584).<sup>m</sup>

### E. A SUITABLE OBJECT.

#### § 202.

The thing itself, moreover, must be one to which the doctrines of prescription are applicable; this is not the case with respect to—

A. Royal rights,<sup>n</sup> as between governors and governed ;<sup>o</sup>

B. Things *extra commercium*,<sup>p</sup> as existing freedom,<sup>q</sup> *res sacrae* and *religiosae*,<sup>r</sup> parish boundaries,<sup>s</sup> and, in Catholic countries, tithes when sought to be claimed by a layman ;<sup>t</sup>

C. Moveable things carried off by force or stealth,<sup>u</sup> unless that objection has been since removed.<sup>v</sup>

<sup>1</sup> Höpfner Comm. § 1182. Pfeiffer *loc. cit.* 290—303.

<sup>m</sup> I was formerly of a different opinion but in this case there is *conscientia rei alienae* and nothing more is required for the canonical *mala fides superveniens*.

<sup>n</sup> L. 6. C. de praeser. 30 vel 40 ann. (7. 39.). Hunting privileges are not of this class. Gans Zeitschr. 4. Hft. Nr. 16.

<sup>o</sup> I. H. Boehmer de praescript. contra LL. maxime prohibitivas. (Exerc. T. 5.) § 13. not. x.

<sup>p</sup> cap. 8. X. de consanguin. et affin. (4. 14.). There is a conflict of laws with reference to certain *res communes* and *publicas*, see L. 45. pr. de usurp. (41. 3.) L. 7. de divers. temporal. praeser. (44. 3.) Compare Unterholzner 1. B. § 55. H. K. Hofmann Beitr. z. d. Lehre v. d. Eintheil. d. Sachen. Darmst. 1831. p. 47—60.

<sup>q</sup> L. 3. C. de long. temp. praeser. quae pro lib. (7. 22.) Unterholzner 2. Bd. § 290.

<sup>r</sup> § 1. I. h. t. (2. 6.).

<sup>s</sup> cap. 4. X. de parochiis (3. 29.). I. H. Boehmer ius parochial. S. 3. c. 3. § 13.

<sup>t</sup> cap. 7. X. de praeser. (2. 26.). I. H. Boehmer I. C. P. L. 2. T. 26. § 3. Rave l. c. § 50. 51.

<sup>u</sup> Peinl. Ger. Ord. Art. 209. Thibaut Schrift, § 22. *Contra* Unterholzner 1. B. § 60. Rudorff Civilrecht. Berl. 1843. § 131.

<sup>v</sup> L. 4. § 6. 7. 11. 20. L. 32. pr. L. 42. h. t. (41. 3.). Unterholzner 1. B.

The produce, however, of these imprescribable things is subject to the ordinary rules of prescription.<sup>y</sup>

D. There can be no definite prescription against those laws which relate to the natural flow of rain water.<sup>z</sup>

F. OPPORTUNITY TO INTERPOSE.

§ 203.

Lastly it is necessary that he who is to lose by prescription should have been legally capable of asserting his right. So long as there is no such capability time ceases to run (*præscriptio dormiens*),<sup>a</sup> and consequently it does not run if there is no tribunal to which to resort.<sup>b</sup>

Upon the same principle the *bona adventitia* (*System* § 560) of children cannot be lost by prescription during the continuance of the paternal authority, nor can the property of wards during the continuance of guardianship,<sup>c</sup> nor can a wife's *dos* during marriage unless by the insolvency of her husband she becomes capable of suing,<sup>d</sup> nor, lastly, can Episcopal rights during the vacancy of the Episcopal chair.<sup>e</sup>

Mere impossibility in fact of asserting a right does not prevent time from running.<sup>f</sup> But to this there is an exception in favour

§ 59—75. W. F. C. a Ditmar ad legis Atiniae etc. historiam. Heidelb. 1818. Sintenis im Archiv f. civ. Prax. B. 18. p. 299—307.

<sup>y</sup> L. 48. de A. R. D. (41. 1.). Unterholzner v. d. Verj. § 67.

<sup>z</sup> L. 2. pr. § 1—9. de aqua et aquae pluv. (39. 3.).

<sup>a</sup> L. 7. § 4. C. de praeser. 30 vel 40 ann. (7. 39.). Vangerow Leitfad. § 323. Ann. 2.

<sup>b</sup> I. H. Boehmer de iustitio (Exerc. T. 2.). Müller ad Leyser Obs. 749. 750. Marezoll in his Zeitschr. B. 7. Nr. 8.

<sup>c</sup> L. 1. § 2. C. de annali except. (7. 40.) L. 3. C. de praeser. 30 ann. (7. 39.) Nov. 22. cap. 24. A. a Daniels de usucapione et praescriptione adversus pupillos et minores. Bonn. 1827. Heimbach in Linde Zeitschr. B. 16. Nr. 2. Sintenis Civilr. B. 1. § 51. Note 32.

<sup>d</sup> L. 16. de fundo dotali (23. 5.), compared with L. 30. C. de iure dot. (5. 12.). Daniels l. c. p. 37—47. Of a somewhat different opinion is Löhr im Archiv für civilist. Prax. 10. B. 69. 70. Unterholzner 1. B. § 78—80. See too Buchholtz jurist. Abh. Nr. 11.

<sup>e</sup> cap. 15. X. de praescript. (2. 26.).

<sup>f</sup> Contra Kori § 42. 44. but see Thib. Syst. § 628.

of Church property illegally alienated by a Church officer; for during his life there is no prescription.\*

### § 204.

**Res meræ facultatis.**—If the above requisites are not present rights are *res meræ facultatis*, and neither from the positive nor from the negative acts of the person entitled does any duty active or passive arise. But almost all these so called *res meræ facultatis* can, if the before mentioned conditions exist, become subject to the laws of prescription.<sup>h</sup>

## 2. Extinctive Prescription.

### § 205.

With respect to *prescriptio extinctiva* (§ 196) the following principles must be borne in mind:

A. No right is thereby lost unless by virtue of some special law to that effect (which, however, in general exists), and then only so far as such loss is expressly required. But nevertheless, by the mere loss of the power to sue the entire right is always gone.<sup>i</sup>

B. The periods of time are different for different cases, but it is a rule that—

a. By a *lis pendens* all rights of action are kept alive; <sup>k</sup>

b. A period of 100 years must elapse before the rights of the

\* c. 10. Caus. 16. qu. 3. Martin Rechtsgutachten 1. B. 256. 257. Unterholzner 1. B. § 44.

<sup>h</sup> See as to the *res meræ facultatis*: P. Toullien collect. Diss. III. C. G. Bauer respons. T. I. Resp. 1. C. G. Biener opusc. Vol. II. nr. 75—79. Glück Pand. B. 1. § 15. Thibaut's above cited Schrift § 22. Note 1. Kori § 40. Blätter für Rechtsanwendung. Erl. 1838. p. 63.

<sup>i</sup> L. 9. § 4. de iureiur. (12. 2.) L. 5. § 6. de dol. except. (44. 4.) L. 6. de O. et A. (44. 7.) L. 5. 6. C. de except. (8. 36.), comp. with Nov. Valentiniani 8. Cod. Theod. L. 4. T. 14. c. 1. § 1. L. 4. 9. C. de prescr. 30 ann. (7. 39.). Opinions upon this subject certainly differ. Weber v. d. natürl. Verb. § 92. Archiv. für civilist. Prax. 10. Bd. 70—77. Pfeiffer pract. Ausfüh. 2. B. Nr. A. III. Heimbach in Linde Zeitschr. 1. B. Nr. 22. Vermehren ebenda 2. B. Nr. 9. 10. Unterholzner Verj. B. 2. § 258. K. Büchel civilrechtl. Erört. 1. B. 1. Hft. Marburg, 1832. 2. B. p. 255—264. Marb. 1839. Rosshirt Zeitschr. B. 1. 156—172.

<sup>k</sup> Post § 208.

Papal see are lost, and a period of 40 years is required for the extinction of the rights of the church.<sup>1</sup>

# A. EXTINCTION OF ACTIONS.

## § 206.

Actions are almost without exception subject to the doctrines relating to extinctive prescription, and are governed by the following principal rules :

A. In cases of doubt all actions are *perpetuæ*, i.e. must, in the language of the Code, be brought within thirty years, unless by some special older or newer law the period is enlarged or shortened.<sup>m</sup> If the last be the case the actions are called *temporales*.

B. But, in order that the time within which actions must be brought may begin and continue to run, it is necessary that—

a. The bringing of the action be legally possible, i.e. that the *actio* be *nata*;<sup>n</sup> and it may be here laid down as a rule, that in bilateral obligations no right of action accrues to either party until due performance on his part.<sup>o</sup>

b. He who seeks by prescription of this kind to attain the position of a possessor must have possessed for the whole of the time; he cannot prescribe further than his possession warrants (*tantum est præscriptum quantum possessum*).<sup>p</sup> Consequently where there is a right to certain periodical dues (*annua, menstrua, &c.*) the lapse of thirty years only bars the right to the unpaid dues; the right to the dues generally is not lost, unless the person obliged to pay them has withstood the right altogether, and the party entitled to receive them has remained passive for the whole time of prescription.<sup>q</sup>

<sup>1</sup> Auth. Quas actiones C. de SS. eccl. (1. 2.). Thibaut's Schrift, § 41. Buchholtz jurist. Abh. Nr. 29.

<sup>m</sup> L. 3. 4. C. de præscr. 30 ann. (7. 39.). Groening flor. sparsi ad præscr. contra civitates. Giess. 1775. p. 26.

<sup>n</sup> L. 7. § 4. C. cod. L. 1. § ult. C. de annal. except. (7. 40.).

<sup>o</sup> L. 9. § 3. 5. de pign. act. (13. 7.) L. 13. § 4. de pignor. (20. 1.).

<sup>p</sup> Ante § 199.

<sup>q</sup> Rave de præscr. § 119—123. Thibaut's Schrift über Verj. § 60. Gottschalk disc. forens. T. 2. nr. 6. 8. 29. Contra I. H. Boehmer de præscript.



c. He who seeks to prescribe must not have recognised the right of the other party.<sup>r</sup> Hence it is a rule, that actions for partition and similar objects e.g. *communi dividundo* (*System* § 258), *finium regundorum* (*System* § 260), *familie herciscundæ* (§ 899), and *pro socio* (*System* § 473), are only barred by a lapse of thirty years,\* when one party has assumed an exclusive right against the other.<sup>t</sup>

If, however, the conditions of extinctive prescription have not yet arisen, but those of acquisitive prescription (§ 196) have arisen, the existence of the latter necessarily entails that of the former.<sup>u</sup>

### § 207.

**Exceptions.**—The rule that all rights of action last thirty years has many exceptions:

A. When that time is extended as—

a. When the action is to recover money lost in play;

b. When the action is personal and vested in the Fisc. In the first case the limit is fifty years,<sup>x</sup> in the last forty years.

c. The old actions instituted by the state, actions pending, and those instituted by the church also came within this exception.<sup>y</sup>

B. When that time is shortened;

a. Some *actiones rei persecutorie* (§ 68) lasted only four years;<sup>z</sup> e.g. such civil actions for compensation as could be brought against the Fisc or the Prince,<sup>a</sup> in respect of alienated property (*System*, § 250), and as could be brought by the Fisc against the possessor of things to which no one was entitled as heir.

b. With respect to Penal actions—

*annuorum reddituum realium* (Exerc. T. 5.). Müller ad Leyser Obs. 449. 601. It is otherwise with capitals bearing interest. L. 8. § 4. C. de præscr. 30 ann. (7. 39.).

<sup>r</sup> Ante § 199.

<sup>s</sup> L. 1. § 1. C. de annal. except. (7. 40.).

<sup>t</sup> Rave l. c. § 127. 147—149.

<sup>u</sup> Toullieu l. c. § 64—80. Thibaut's Schrift, § 45.

<sup>v</sup> L. ult. C. de aleae usu et aleatoribus (3. 43.).

<sup>w</sup> Ante § 205.

<sup>x</sup> See Thib. Syst. § 292., and for other examples § 107. 314. 493. 548. 896. 988.

<sup>y</sup> § 14. I. de usucap. (4. 6.).

a. The Prætorian last only one year, i.e. he who seeks to avail himself of a prætorian edict for the purpose of inflicting punishment must do so within an *annus utilis*<sup>b</sup> (§ 95); but the action is perpetual so far as it seeks to compel the possessor merely to restore the profit which he has wrongfully made.<sup>c</sup> Consequently, those interdicts which rest entirely on the prætorian edicts must, so far as they go for damages, be instituted within a year and can afterwards only be made use of to recover the profits. It is true that we have only a few decisions upon this subject,<sup>d</sup> but as all the above rules are logically deducible from the first, those interdicts which have no limitation specially fixed by law must be governed by similar principles. Nevertheless, the following are perpetual;<sup>e</sup> namely, the interdicts *unde vi*, (when the people belonging to a person absent are turned out,<sup>f</sup>) *de homine libero exhibendo*<sup>g</sup> and *de precario*.<sup>h</sup> Moreover, all suits founded on transactions duly ratified by the proper civil authorities, as the *actio de recepto*<sup>i</sup> and the *actio depositi* for a repudiated *depositum miserabile*,<sup>k</sup> can be instituted within thirty years although punishment is their object.

β. Civil penal actions do not in general form any exception to the general rule.<sup>l</sup> Some persons nevertheless limit all actions of tort to one year,<sup>m</sup> but this is only true when they are founded on prætorian law.<sup>n</sup>

<sup>b</sup> L. 6. de calumn. (3. 6.).

<sup>c</sup> Pr. I. de perpet. et tempor. act. (4. 12.) L. 35. de O. et A. (44. 7.) L. 2. C. unde vi (8. 4.) L. 21. § 5. rer. amotar. (25. 2.), compared with L. 2. C. eod. (5. 21.) See generally Unterholzner 2. B. § 269. 272. 281. 283.

<sup>d</sup> L. 4. de interd. (43. 1.) L. 1. pr. § 39. de vi (43. 16.) L. 2. C. unde vi (8. 4.) L. 1. pr. L. 3. § 11. uti poss. (43. 17.) L. 15. § 3. 4. 5. L. 22. pr. quod vi aut clam (43. 24.).

<sup>e</sup> L. 1. § 4. de interd. (43. 1.).

<sup>f</sup> L. 1. C. si per vim (8. 5.).

<sup>g</sup> L. 3. § ult. de lib. hom. exhib. (43. 29.).

<sup>h</sup> L. 8. § 7. de precario (43. 26.).

<sup>i</sup> L. ult. § 6. nautae caupon. stab. (4. 9.).

<sup>j</sup> L. 18. depos. (16. 3.).—Compare Thib. Syst. § 554. 566. 828.

<sup>k</sup> pr. I. h. t. (4. 12.).

<sup>l</sup> Weber v. Injur. 2. Abth. § 18.

<sup>m</sup> L. 5. C. de iniur. (9. 35.). Thibaut's Schrift, § 53.

C. Lastly, there are cases in which actions not generally forming any exception to the rule, do form an exception under certain circumstances. Compare the *System* §§ 345, 363, 657, 814.

### § 208.

**Interruptions.**—Civil interruption (§ 199) occurs in all cases of limitations of actions whenever proceedings are actually taken against the person prescribing. If he be cited before a judge or arbitrator,<sup>o</sup> the interruption is such that, as against the plaintiff,<sup>p</sup> a new period of forty years begins to run from the last step taken by him in the suit.<sup>q</sup> Prætorian annual actions are perpetuated if they are brought before the sovereign and he afterwards makes a rescript in the cause.<sup>r</sup>

## B. EXTINCTION OF DEFENCES.

### § 209.

Pleas may be lost by prescription when the ground of defence could have been made a ground of action and the right of action is gone by lapse of time;<sup>s</sup> but otherwise time is generally no bar to a plea.<sup>t</sup> The exceptions to this last rule are the *exceptio non numeratæ et solutæ pecuniæ* and *dotis*,<sup>u</sup> and the plea of com-

<sup>o</sup> L. 5. § 1. C. de recept. arbitr. (2. 56.) L. 3. C. de ann. exc. (7. 40.) cap. 20. X. de offic. et pot. iud. del. (1. 29.) cap. 10. X. de offic. leg. (1. 30.) Clem. 2. ut lite pend. (2. 5.) I. H. Boehmer l. E. P. L. 2. T. 3. § 17. L. 2. T. 16. § 2. 3. C. E. Pfotenhauer über die Unterbrechung der Klagenverjährung. Leipz. 1843.

<sup>p</sup> L. 1. C. de pr. l. t. (7. 33.).

<sup>q</sup> L. 9. C. de præscr. 30 ann. (7. 39.) L. 1. § 1. C. de annal. exc. (7. 40.). Linde Zeitschr. B. 2. Nr. 5. & 6. See too Hommel rhaps. V. 1. Obs. 109. p. 172. Winkler de litis contest. Sect. 3. § 3. Glück Pand. 6. B. § 503. *Contra* Vangerow Leitfaden B. 1. § 152. Anm. 1.

<sup>r</sup> L. 2. C. quando libell. (1. 20.). Löhr im Archiv f. civil. Prax. B. 10. 84—86.

<sup>s</sup> L. 9. § 4. de iureiur. (12. 2.) l. 6. de O. et A. (44. 7.). For the different opinions see Hommel rhaps. Vol. 3. nr. 481. Höpfner Comm. § 1199. Note 2. Wehrn v. d. gerichtl. Einwend. § 7. Sommer rechtswiss. Abh. Nr. 1. Archiv für civilist. Prax. 10. B. 80. 81. Sintenis Civilrecht. B. 1. § 32. Note 39. and the works cited *ante* § 205. Note i.

<sup>t</sup> L. 5. § 6. de doli exc. (44. 4.) L. 5. C. de except. (8. 36.)

<sup>u</sup> See Thib. Syst. § 488.

petence when a son, no longer subject to the *patria potestas*, is after many years sued for a debt contracted by him when he was so subject.<sup>x</sup>

*DIVISION III. OF THE RESTORATION OF RIGHTS AND DUTIES.*

§ 210.

Legal relations which are once destroyed can only arise again by some special circumstances. This may happen—

I. By any of those circumstances which on general principles give rise to legal relations and by which the rights of third persons are not affected;<sup>y</sup>

II. By a legal provision (*reviviscentia*) as soon as some event happens;<sup>z</sup>

III. And lastly, by the decision of a judge pronounced either *ex officio*<sup>a</sup> or on the appeal of the injured party. Restoration founded on equitable doctrines contrary to the strict principles of law is termed more particularly *restitutio in integrum*.<sup>b</sup>

<sup>x</sup> Thib. Syst. § 592. Nr. 9.

<sup>y</sup> L. 27. § 2. L. ult. de pact. (2. 14.). Voet L. 46. T. 3. § 29.

<sup>z</sup> L. 14. pr. quem serv. am. (8. 6.) L. 5. § 1. L. 19. pr. L. 20. § 1. de captivis (49. 15.). A. L. Hombergk zu Vach de reviviscentia iuris extincti. Marb. 1743.

<sup>a</sup> In those cases where he ought to make such decisions, as for example with respect to the property of minors.

<sup>b</sup> Thib. Syst. § 610—628.

## CHAPTER V.

## OF THE EXERCISE OF RIGHTS AND ESPECIALLY OF POSSESSION.

## § 211.

THE nature of rights considered as mere objects of laws has now been fully determined. But in order to render our review of rights complete, we must investigate them with reference to their exercise. According as a person in whom a right resides exercises it or not, or as a person assumes to exercise a right not in fact residing in him, can such exercise be regarded as coupled with the right or not, or as existing without any right and simply by itself.<sup>c</sup> The mere actual exercise of a right, or of an assumed right, constitutes possession (*possessio*) in its most general sense.<sup>d</sup>

## § 212.

As it is a fundamental principle based upon reason that no one,

<sup>c</sup> L. 12. § 1. L. 42. pr. de acq. v. am. poss. (41. 2.) L. 1. § 2. uti poss. (43. 17.)

<sup>d</sup> F. Ramos und F. Retes ad Tit. de acquir. poss. (Meerman Th. T. 7.). L. J. Jupille essai sur les principes du droit en matière de possession. Louv. 1780. (reviewed in Hugo civ. Mag. B. 3. Nr. 21.). Pothier tr. de la possession. Ed. nouv. Paris 1807. Westphal Syst. des R. R. über die Arten der Sachen § 9—321. A. I. Cuperus obss. selectae de natura possessionis. Lugd. Bat. 1789, edited by Thibaut. Ienae 1804. C. F. W. v. Spangenberg Vers. einer system. Darst. d. Lehre v. Besitz. Bayr. 1794. F. G. Fleck hermeneut. Tit. D. de acquir. vel am. poss. spec. duo. Lips. 1796. C. Chlum der Besitz unter Justinian. Marb. 1808. *Idem* über das Recht des Besitzes. Giess. 1813. C. C. Dabelow reprehensa Savignii capita. Cum postscripto Lipsiae 1810. J. C. Lange philos. jurist. Abh. über die Natur des Besitzes. Erl. 1813. 1818. 2. B. 8. Hufeland Rechtslehre vom Besitz. Giess. 1815. T. M. Zachariä neue Revision der Theorie des R. R. vom Besitze, Leipz. 1824. F. W. v. Tigerström das Recht des Besitzes. Berlin 1836. Darstellung der Lehre vom Besitz. Berlin 1840. K. Pfeiffer Was ist u. gilt im R. R. der Besitz. Tub. 1840. G. F. Puchta in Weiske Rechtslexikon B. 2. 41—73. The great work is F. C. v. Savigny das Recht des Besitzes. 6. Aufl. Giess. 1837. [of which there is an English translation by Sir Erskine Perry. *Trans.*]

in the absence of a stronger right in him, can lawfully interfere with another, the mere actual state of things above mentioned becomes of the highest juridical importance, since it gives rise to the rule, that every person who, in point of fact, is in the exercise of a right real or assumed, must be allowed so to remain until some reason can be shown why he should not.<sup>c</sup> By the Roman law possession of *things* (*possessio* in its narrower and strict sense)<sup>f</sup> further gave rise to special consequences; as, for example, very often to the right to obtain legal protection in a summary manner, and, if continued long enough, to a prescriptive right. With reference to these consequences the doctrines relating to possession, in the above strict sense, are developed most carefully by the Romans, and many nice distinctions are introduced, which could have to be noticed in a system of their law. The great principles, however, upon which the law of possession is based will, if examined apart from these accidental consequences of the possession of a corporeal thing, be found to be precisely those which govern the actual exercise of any right whatever.<sup>g</sup>

### § 213.

The law relating to possession resolves itself into answers to the four following questions, viz: what is possession and what are its essentials? how is it acquired? how is it lost? what are its consequences?

With reference to the three first questions it is only necessary to give an exposition of the Roman theory of possession in the strict sense of the word, and to deduce therefrom the nature of possession in general, which is nowhere completely declared. But as regards the fourth question we can collect from legal enactments by a comparison of the Roman, Canon, and German law, a

<sup>c</sup> See *post* for the consequences of possession.

<sup>f</sup> L. 3. pr. h. t. (41. 2.).

<sup>g</sup> Hufeland 31—41. See however for somewhat different opinions, Savigny 1—101. Schweppe Magaz. 1. St. 38—50. Archiv für civil. Prax. 8. B. Nr. 1. Puchta im Rhein. Mus. f. J. 3. Jahrg. Nr. 17. Mühlenthal Pand. 2. Bd. § 229. 230. 233.

complete system of principles to which the effects common to possession in general as well as those peculiar to certain kinds of possession may be referred.

### I.—NATURE OF POSSESSION.

#### § 214.

Possession, in its strict and original meaning, signifies the actual holding of a corporeal thing, coupled with an intention to make use of such holding for some legal purpose or other (*animus tenendi*);<sup>b</sup> but the words *possessor* and *possessio* are sometimes improperly used in speaking of property,<sup>i</sup> especially prætorian property,<sup>k</sup> and of the state of a defendant in an *actio in rem*.<sup>l</sup> In the last sense those persons also are called *possessores* (in modern times *ficti possessores*), who, although not in fact in possession, are treated as proper defendants in such actions; for example, a person who has fraudulently given up his possession in order to avoid being sued (*qui dolo possidere desiit s. dolo possessionem noluit admittere*),<sup>m</sup> or one who for fraudulent purposes allows himself to be made defendant in an *actio in rem*, when there is no pretence for his being sued (*liti se offerens*).<sup>n</sup>

#### § 215.

The notion of an actual holding (detention), coupled with an intention to hold, lies at the bottom of the whole Roman law of possession.<sup>o</sup> It is true that in later times this notion was occa-

<sup>b</sup> L. 1. pr. L. 3. pr. § 3. L. 41. h. t. (41. 2.). Galvanus de usufr. c. 33. Sinteris Civilrecht B. 1. § 42.

<sup>i</sup> L. 15. qui satisd. cog. (2. 8.) L. 78. de V. S. (50. 16.) Savigny § 8. p. 106. 107. Puchta Coursus B. 2. p. 516.

<sup>k</sup> L. 115. de V. S. (50. 16.). Savigny § 12 a.

<sup>l</sup> L. 9. L. 16. § 4. 7. L. 18. § 1. L. 34. § 1. L. 35. de hered. pet. (5. 3.) L. 10. in f. si pars hered. pet. (5. 4.) with the exception of suits respecting servitudes. Savigny § 8. p. 107—109.

<sup>m</sup> L. 20. § 6. L. 25. § 2. 8. de her. pet. (5. 3.) L. 150. L. 157. § 1. de R. I. (50. 17.).

<sup>n</sup> L. 45. de her. pet. (5. 3.) L. 7. L. 25. L. 27. pr. § 3. de R. V. (6. 1.) L. 131. de R. I. (50. 17.).

<sup>o</sup> L. 1. pr. L. 3. pr. § 3. L. 41. h. t. (41. 2.).

sionally departed from, in as much as possession in the above sense was often not recognised at all, and a juridical possession was recognised in the absence of any actual holding, or of any intention to hold (*possessio ficta*);<sup>p</sup> but these departures are to be treated as special, and consequently neither from them nor from the original idea can any notion of possession be abstracted which is at once positively and negatively accurate; they must be considered as exceptional cases and excluded from the operation of the fundamental principle which, except as to them, is of universal application. That this view is correct is clearly shown by the fact that much more is requisite for the acquisition of possession, which is an easy simple act, than for its continued existence which is attended with considerable difficulty: this at once proves that there is no one all pervading idea.<sup>q</sup>

### § 216.

**Possession Proper.**—Before we proceed further with the examination of the nature of possession it is necessary to make the following observations.

For the protection of a disturbed and for the re-acquisition of a lost possession, special summary means (interdicts) are appointed. It is not, however, every detaining person but only certain persons who can take advantage of them. Those only for the protection of whose possession of corporeal things, and in whose own names interdicts can be obtained, are strictly speaking *possessores*;<sup>r</sup> and the fundamental rule is that interdicts can only be obtained for the protection of him who is in possession as a true or usurping owner (*animo domini*).<sup>s</sup> Those persons who merely exercise rights over the things of others are not considered possessors whether

<sup>p</sup> L. 49. pr. § 1. eod. Cuperus l. c. P. 1. c. 3.

<sup>q</sup> L. 4. C. h. t. (7. 32.). *Contra* T. M. Zachariae (praes. C. G. Haubold) *universalia quaedam de possessione principia e iure Rom. collecta*. Lips. 1805.

<sup>r</sup> L. 1. § 23. de vi (43. 16.) L. 3. § 8. uti poss. (43. 17.).

<sup>s</sup> § 4. 5. 6. I. de interdict. (4. 15.) L. 9. de R. V. (6. 1.) L. 1. § 10. 23. de vi (43. 16.) L. 7. pr. de damn. inf. (39. 2.) L. 30. § 2. h. t. (41. 2.). Savigny § 23. Some carry this further; but see Vangerow *Leitfaden* § 200. Anm. 1.



they hold expressly for the real owners,<sup>c</sup> or are in possession of the things of another as such for their own benefit by virtue of some right *in personam*<sup>u</sup> or *in rem*.<sup>x</sup> However, a juridical *possessio* is, to the exclusion of the true owner, attributed to the holder of a *pignus*,<sup>y</sup> in order to protect him; but without at the same time depriving the former of the advantages of prescription.<sup>z</sup> Such a possession moreover can be transferred by contract express or implied to one who exercises other rights over another's property: as for example to a sequestrator when possession is given him,<sup>a</sup> and to a receiver of a *precarius* when the grantor gives up to him the possession or the whole thing and not merely a precarious use of it.<sup>b</sup> So also has every other person a similar *possessio* in whose favour, as in the case of a bailee or tenant, the owner renounces his rights of possession.<sup>c</sup> Those persons who hold only by virtue of a *jus in re aliena* and yet are looked upon as *possessores* are usually said to have a derived possession. It is not possible to give any general notion of the *animus possidendi* common to such persons and to owners in possession.<sup>d</sup>

<sup>c</sup> L. 1. § 22. de vi (43. 16.).

<sup>a</sup> L. 8. commod. (13. 6.) L. 3. § 20. L. 25. § 1. h. t. (41. 2.) L. 6. § 2. de precar. (43. 26.).

<sup>x</sup> L. 6. § 2. cit. L. 12. pr. L. 52. pr. h. t. (41. 2.) L. 3. § 7. uti possid. (43. 17.). *Contra* Büchel Erört. B. 1. Hft. 3. p. 45. 46. 65. 66.

<sup>y</sup> Not being a praetorian pledge holder L. 3. § 23. L. 10. § 1. h. t. (41. 2.) L. 3. § 8. uti poss. (43. 17.). Savigny § 24.

<sup>z</sup> L. 37. de pign. act. (13. 7.) L. 1. § 15. L. 36. h. t. (41. 2.) L. 16. de usurp. (41. 3.). Savigny § 24.

<sup>a</sup> L. 17. § 1. depos. (16. 3.) L. 3. § 20. L. 39. h. t. (41. 2.) Cocceii I. C. L. 16. T. 3. qu. 19. Savigny § 25.

<sup>b</sup> L. 2. § 3. L. 4. § 1. L. 6. § 2. 4. L. 12. pr. L. 15. § 4. L. 17. de precar. (43. 26.) L. 21. § 3. h. t. (41. 2.) *Contra* Savigny § 25. C. E. Degener über den Begriff des precarii. Leipzig 1831. But see A. W. de Schroeter obs. iur. civ. Ien. 1826. p. 66—80.

<sup>c</sup> Schroeter l. c. p. 80—84. Rosshirt im Archiv f. civil. Prax. 8. B. 10. 14. Savigny § 23. is of a different opinion.

<sup>d</sup> Savigny § 23. 24. Buchholtz Versuche. Nr. 8. See for other opinions Schröter in Linde Zeitschr. 2. B. Nr. 7. Warnkönig im Archiv. f. civil. Prax. 13. B. Nr. 9. Guyet Abhandl. Nr. 6. and in Linde Zeitschr. 4. B. Nr. 16. Johannsen Begriffsbestimmungen. Heidelb. 1831. Bartels in Linde Zeitschr. 6. B. Nr. 4. F. v. Thaden über d. Begriff des Röm. Interdictenbe-

## § 217.

**Posseasio civilis et naturalis.**—That *possessio* in a strict sense which leads to the peculiar possession for the protection of which interdicts are as a rule solely applicable is completely artificial, but is one of the most important results of legally recognised possession; for in the *absence* of such *possessio* there can be no usucaption. For these reasons a *possessor* in a strict sense is by way of distinction said, in the language of the Roman law, *civiliter possidere*. Other persons who may be in actual occupation, but to whom *possessio civilis* is not attributed, and who as an incidental consequence are not able to acquire a right by usucaption are said *naturaliter tantum possidere* or *non possidere*, or *civiliter non possidere*<sup>c</sup> or *tenere tantum*; but yet under certain circumstances they may be deemed to be in what is called *quasi possessio* (§ 229). It must, however, be observed that in what is most material the positive expression *civiliter possidere* has nothing to do with that possession which is the foundation of usucaption, and that the negative expression *civiliter non possidet* does not denote the mere absence of such a possession.<sup>f</sup> With reference to usucaption special terms applied to possession are essentially and entirely meaningless.<sup>g</sup>

## § 218.

**Juridical Possession.**—The nature of possession in general as now juridically determined is characterised as follows. Possession

sitzes. Hamburg 1833. Rauh Versuch einer Geschichte der Lehre v. Besitz. Landau 1834.

<sup>c</sup> L. 24. h. t. (41. 2.) L. 2. § 1. pro herede (41. 5.), compared with L. 3. § 20. h. t. (41. 2.) L. 33. § 1. de usurp. (41. 3.) L. 1. § 22. 23. de vi (43. 16.) L. 38. § 7. 8. de V. O. (45. 1.). Thibaut Abh. im Archiv f. civ. Pr. B. 18. Nr. 13. B. 23. Nr. 5. Rosshirt Zeitschr. B. 4. 82—90. Johannsen *loc. cit.* and Sintenis Civilrecht B. 1. § 42. Note 23. come to the same conclusion on different grounds.

<sup>f</sup> *Contra* Savigny § 7. 10. and others especially Thon im Rhein. Mus. f. J. 4. Jhrg. p. 95—141. principally on account of L. 3. § 15. L. 7. § 1. ad exhib. (10. 4.) L. 26. pr. de don. int. V. et U. (24. 1.) L. 1. § 9. 10. de vi (43. 16.). See too Burchardi im Archiv f. civ. Prax. B. 20. Nr. 2. Puchta Verisimilium cap. VI. Lips. 1839. Vangerow Leitfaden § 199.

<sup>g</sup> *Contra* Schweppe Röm. Priv. R. 2. B. § 214. Wiederhold das Interdictum uti possidetis. Hanau 1831. p. 6—10.

is a mere fact independent of any right.<sup>h</sup> In general it is therefore immaterial whether the act by which possession is acquired be lawful (*possessio justa*) or unlawful (*possessio injusta*),<sup>i</sup> and, if the latter, whether the possessor was aware of the unlawfulness of the act (*malæ fidei possessio*) or not (*bonæ fidei possessio*); but in some cases this may be of consequence.<sup>k</sup> It must, however, be here observed that in case of an excusable mistake of law the possessor is to a certain extent to be considered as *malæ fidei possessor*, viz., so far as he attempts to make an acquisition, but not so far as he only seeks to avoid the penalties resulting from *mala fides*.<sup>l</sup> As moreover the fact of possession has no juridical importance except so far as it affords a ground for a temporary presumption, there can be no juridical possession where that presumption cannot arise.<sup>m</sup>

On this principle there can be no possession—

1. Of things *extra commercium*.<sup>n</sup>
2. Of freemen detained with a knowledge that they are free.<sup>o</sup>
3. By slaves.<sup>p</sup>
4. By a *filius familias* in those cases in which he cannot acquire things for himself.<sup>q</sup>
5. Generally by any one who is himself the object of the possession of another.<sup>r</sup>

<sup>h</sup> L. 12. § 1. L. 42. pr. L. 52. pr. h. t. (41. 2.).

<sup>i</sup> L. 13. § 1. de publ. in rem act. (6. 2.) L. 22. § 1. de noxal. act. (9. 4.) L. 7. § 8. comm. divid. (10. 3.) L. 3. § 5. L. 16. h. t. (41. 2.) L. 1. § 2. pro donato (41. 6.) Compare Cuperus P. 2. c. 2—5. Savigny § 8.

<sup>k</sup> L. 13. § 8. L. 25. § 3. de her. pet. (5. 3.) L. 109. de V. S. (50. 16.) § 35. I. de rer. div. (2. 1.) L. 2. C. de fruct. (7. 51.) Sintonis Civilr. B. 1. § 42. Nr. IV.

<sup>l</sup> L. 25. § 6. de her. pet. (5. 3.) L. 31. pr. de usurp. (41. 3.). Voet L. 5. T. 3. § 7. Cocceii I. C. eod. qu. 11. See *contra* Schöman vom Schadenserfatz 2. B. 180. 181.

<sup>m</sup> Hence the rule of German law: ein liquides Petitorium absorbiert das Possessorium: see § 238. Gesterding Nachforsch. 1. B. 145—159. Rosshirt Zeitschr. B. 1. 234—237.

<sup>n</sup> L. 3. § 17. L. 30. § 1. 3. h. t. (41. 2.).

<sup>o</sup> L. 1. § 6. L. 23. § 2. L. 30. § 4. L. 38. pr. eod.

<sup>p</sup> L. 24. L. 30. § 3. L. 49. § 1. eod.

<sup>q</sup> L. 30. § 3. L. 49. § 1. eod. L. 4. § 1. de usurp. (41. 3.) L. 93. de R. I. (50. 17.).

<sup>r</sup> L. 1. § 6. h. t. (41. 2.) L. 118. de R. I. (50. 17.).

## § 219.

Every possession presupposes two facts, viz., an actual holding and an intention to hold. Whoever, therefore, cannot hold (such as fictitious and legal persons) is as incapable of possessing as a person without a will,<sup>a</sup> and moreover there can be no possession of an uncertain object;<sup>t</sup> but these principles are to be received with considerable modifications as will be hereafter shown when the modes in which possession may be acquired and lost are explained. If, however, there be an actual holding and an intention to hold there is possession as far as, but no further than such intention extends;<sup>u</sup> but here the exception must be noticed that he who possesses a complex thing is not to be considered as possessing the component parts thereof, any further than he possesses the principal thing.<sup>v</sup> But if he previously possessed those component parts as independent things, this possession continues unchanged even after their junction with another moveable.<sup>v</sup> Moreover, the effect of completed prescription continues after the separation of the accessories, except when they cannot be made the objects of an *actio in rem*.<sup>z</sup>

## § 220.

As the existence of several things in the same place at the same time is impossible, several persons cannot at the same time entirely possess the same thing; and the possession of one person

<sup>a</sup> L. 1. § 3. 22. L. 34. pr. § 1. h. t. (41. 2.) L. 1. § 15. si quis testam. liber (47. 4.). Warnkönig im Archiv. f. civ. Prax. B. 20. Nr. 13.

<sup>t</sup> L. 3. § 2. L. 26. h. t. (41. 2.).

<sup>u</sup> L. 26. cod.

<sup>v</sup> L. 7. § 1. 2. ad exhib. (10. 4.) L. 23. pr. § 2. L. 25. 26. de usurp. (41. 3.) L. 2. §. 6. pro emt. (41. 4.)

<sup>v</sup> L. 7. § 1. ad exhib. (10. 4.) L. 33. pr. de usurp. (41. 3.). See as to immoveables, L. 30. § 1. cod. Archiv f. civ. Prax. B. 7. Nr. 3. B. 25. Heft 3. Nr. 1. B. 27. Nr. 9. 15. Savigny § 22. Windscheid in Sell Jahrb. B. 1. Nr. 12. Vangerow Leitfaden § 204. Anm. 2.

<sup>z</sup> L. 23. § 7. L. 59. de R. V. (6. 1.) L. 7. § 11. de A. R. D. (41. 1.) L. 23. § 2. de usurp. (41. 3.). Savigny p. LXVII. &c. Archiv für civilist. Prax. 8. B. 332. Note 15. & 20. B. Nr. 4.

is consequently lost the moment it is acquired by another.<sup>a</sup> Nevertheless it is conceded that several persons may at the same time jointly possess a thing in ideal portions;<sup>b</sup> such a state of joint possession is, if juridical, termed *compossessio* or, if it be in right of others, *condetentio*.<sup>c</sup>

## II.—ACQUISITION OF POSSESSION.

### § 221.

For the acquisition of the possession of a thing, physical apprehension of it and an intention to detain it must co-exist.<sup>d</sup> Hence,

1. A merely ideal person cannot by itself commence a possession;<sup>e</sup> nor does an heir become possessed of the inheritance by its mere devolution upon him, although he succeeds to all the possessory remedies actually acquired by the deceased.<sup>f</sup>

2. Persons without a will cannot by themselves acquire possession.<sup>g</sup> This principle is applicable without qualification to those *infantes* deemed by law to have no will,<sup>h</sup> but not to other persons under the age of puberty.<sup>i</sup>

<sup>a</sup> L. 3. § 5. h. t. (41. 2.) L. 19. pr. de precar. (43. 26.) L. 5. § 15. commod. (13. 6.). Savigny § 11. A. F. v. d. Hagen, über d. gleichzeitigen Besitz des precario rogans u. des rogatus. Hamm 1840, is of a somewhat different opinion.

<sup>b</sup> L. 26. h. t. (41. 2.) L. 5. pr. de carbon. edict. (37. 10.) L. 10. pr. C. de bon. auct. iud. (7. 72.).

<sup>c</sup> S. Stryk de compossessione. Hal. 1674. (op. T. 2. n. 17.).

<sup>d</sup> L. 3. § 1. L. 34. pr. h. t. (41. 2.).

<sup>e</sup> L. 1. § 22. L. 2. eod. L. 1. § 15. si quis testam. lib. (47. 4.). C. G. Biener opusc. Vol. I. nr. 66.

<sup>f</sup> L. 23. pr. h. t. (41. 2.). Müller ad Leyser Obs. 514. Stryk de transit. poss. in heredes. Helmst. 1655. Idem U. M. P. L. 41. T. 2. § 6—10.

<sup>g</sup> L. 1. § 3. eod.

<sup>h</sup> L. 1. § 3. L. 32. § 2. eod. The L. 3. C. eod. (7. 32.) is not opposed to this whether as explained by Savigny § 21. p. 284—296., or by Gesterling Nachforsch. 2. B. 8—14., or by Puchta im Rhein. Mus. f. J. 5. B. Nr. 3. who in my opinion has offered the best interpretation of it, but who is wrong in making very young persons an exception, and in drawing too large an inference from gifts.

<sup>i</sup> L. 1. § 3. 11. L. 32. § 2. h. t. (41. 2.).

3. In strictness there can be no transmission of possession (*alienatio, accessio possessionis*); but each person acquires for himself a new possession. If, however, possession is acquired by virtue of a bilateral legal transaction, or by succession on death, the possession of the last holder is continued to the advantage of his successor,<sup>k</sup> but, in the case of an heir, it is accompanied by the defects in the possession of the person to whom he succeeds.<sup>l</sup>

§ 222.

**Modes of Acquisition.**—The modes of acquisition (with respect to which an unseparated accessory is of the same nature as its principal)<sup>m</sup> are twofold, viz.: either unilateral permitted or unpermitted acts (occupation, invasion),<sup>n</sup> or bilateral transactions. Acquisition of possession in the last mode is termed delivery (*traditio*). For this it is necessary that there should be on the part of the transferee an intentional acceptance, on the part of the transferor due abandonment,<sup>o</sup> and also on the part of third persons absence of possession (*possessio vacua*), i.e. the thing must not be in the possession of a stranger, for if it be there can be no delivery of possession until he is ousted.<sup>p</sup> If, however, he who by a bilateral transaction is to acquire juridical possession is already in the actual possession of the thing, there is no necessity for the thing to pass and repass from hand to hand, but juridical possession is conferred by the agreement itself, and, if that be conditional,

<sup>k</sup> L. 4. § 1. 2. de alienat. iudic. mut. causs. (4. 7.) L. 3. § 6—10. L. 6. de itinere (43. 19.) L. 18. § 1. quem serv. am. (8. 6.) L. 13. § 7. 9. h. t. (41. 2.) L. 32. § 1. de S. P. U. (8. 2.) L. 46. de donat. int. V. et U. (24. 1.) L. 11. de A. R. D. (41. 1.) L. 14. § 1. de usurp. (41. 3.) L. 14. 15. 16. de divers. temporal. praeser. (44. 3.). Unterholzner Verjährungslehre I. B. § 131—135.

<sup>l</sup> L. 11. C. h. t. (7. 32.). A. Denzinger die accessio possessionis nach r. u. can. Recht. Würz. 1842. Cap. 2.

<sup>m</sup> L. 40. de act. e. v. (19. 1.). Gesterding Nachforschungen I. B. 354—357.

<sup>n</sup> L. 1. § 1. h. t. (41. 2.) L. 12. de vi (43. 16.).

<sup>o</sup> § 40. I. de rer. div. (2. 1.).

<sup>p</sup> L. 12. C. de probat. (4. 19.) L. 8. C. de act. emt. (4. 49.) L. 13. C. de distr. pign. (8. 28.). This is not contrary to L. 16. de fundo dot. (23. 5.) L. 10. § 2. de cond. furt. (13. 1.). Struben 3. B. 52. Bed. Savigny § 11. *Contra* Gesterding v. Eigenthum 161—171.

on performance of the condition.<sup>3</sup> This is called *traditio brevi manu*.<sup>4</sup> It is clear that there is nothing of a special nature in such a transaction, and the presence of the parties is not essential to the validity of the contract.<sup>5</sup>

### § 223.

**Acquisition by an agent.**—Several modes of acquisition, not in accordance with the foregoing strict mode, but of a singular nature, and consequently not to be extended, have been from time to time legally recognised (*traditio ficta, quasi traditio*).<sup>6</sup> As such, must be considered the rule that possession can be acquired by means of a third person (*possessio mediata*). In order, however, that this may take place it is necessary—

1. That the agent be capable of acquiring possession and that he take it for his principal; and if these requisites are fulfilled, but not otherwise, the principal, without more, acquires whatever any person taking possession can acquire for himself;<sup>7</sup> but it is a doubtful point whether any weight is to be given to the opposing will of a slave, in a case where, at the time of delivery, possession was expressly given him for his master, and the slave, notwithstanding this, took possession for a third party.<sup>8</sup>

2. The principal must himself also either acquiesce in the transaction at or after the acquisition of possession, or be treated by law as if he had acquiesced therein; possession is consequently acquired—

<sup>3</sup> L. 38. § 1. h. t. (41. 2.).

<sup>4</sup> L. 9. § 1. 2. de publician. (6. 2.) L. 9. § 9. de R. C. (12. 1.) L. 62. pr. de evict. (21. 2.) L. 9. § 5. de A. R. D. (41. 1.).

<sup>5</sup> See *contra* Cuiac Obs. l. 4. c. 3. and Voet comm. L. 12. T. 1. § 5. on account of L. 47. de R. V. (6. 1.) L. 11. pr. L. 15. de R. C. (12. 1.) L. 34. pr. mandat. (17. 1.). But see Savigny § 19.

<sup>6</sup> But see Savigny § 13—28. Hufeland v. Besitz. 88—122. Gesterding, v. Eigenthum 69—71. 98. 99. and in his *alte und neue Irrthümer* 21—54, differs from both of them. B. W. Pfeiffer *das Recht der Kriegeroberung*. Cassel 1823. p. 10—19.

<sup>7</sup> L. 1. § 9. 10. 20. h. t. (41. 2.).

<sup>8</sup> L. 13. de donat. (39. 5.) L. 37. § 6. de A. R. D. (41. 1.) L. 1. § 19. h. t. (41. 2.). See for the different interpretations. Chesii interpr. L. 1. c. 32. (in *Iurispr. Rom. et Attica* T. II.). Savigny § 26. Hufeland *Civilr.* 1. B. 727. Fritz *Erläut.* 2. Heft 316—318.

A. By a person as mandatory, from the time that possession is taken; and there is not (except in the case of possession on which to ground prescription) any necessity for special knowledge of the taking possession.<sup>1</sup>

B. By ratifying a previous unilateral acquisition of possession.<sup>2</sup>

C. Moreover masters and heads of families, even if themselves incapable of acquiring possession,<sup>3</sup> acquire that possession which is obtained for them<sup>b</sup> by slaves (the property in or usufruct of which is in them), or by their *fili familias*; and the possession so acquired by the masters and heads of families dates, even without any special knowledge on their part, from the time it is obtained for them.<sup>c</sup> In order, however, that an owner of a slave may as such acquire possession by him, the slave must not be in the possession of any other person.<sup>d</sup>

D. Lastly, guardians acquire possession for those under their care,<sup>e</sup> and even infants may commence the act of detention.<sup>f</sup>

By all these means moral and fictitious persons may acquire possession.<sup>g</sup>

#### § 224.

**Constitutum possessorium.**—From these principles, coupled with the rule that the detention of a thing is just as good as the recent seizure of it, follows the legality of the so-called *constitutum possessorium*.<sup>h</sup> A juridical possessor who wishes to transfer the

<sup>1</sup> L. 49. § 2. L. 51. h. t. (41. 2.) L. 1. C. eod. (7. 32.) L. 41. 47. de usurp. (41. 3.).

<sup>2</sup> L. 24. de neg. gest. (3. 5.) L. 42. § 1. h. t. (51. 2.).

<sup>3</sup> L. 1. § 5. 22. L. 2. eod. L. 16. de O. et A. (44. 7.) L. 22. § 3. L. 29. de captiv. (49. 15.).

<sup>b</sup> See the last note and L. 21. pr. de A. R. D. (41. 1.) L. 1. § 6. 8. L. 49. pr. L. 50. pr. h. t. (41. 2.).

<sup>c</sup> L. 1. § 5. L. 3. § 12. L. 4. L. 24. L. 44. § 1. eod.

<sup>d</sup> L. 1. § 6. L. 34. § 2. eod. L. 21. pr. L. 54. § 4. de A. R. D. (41. 1.).

<sup>e</sup> L. 11. § 6. de pign. act. (13. 7.) L. 13. § 1. de A. R. D. (41. 1.) L. 1. § 20. h. t. (41. 2.).

<sup>f</sup> Ante § 221. Note h.

<sup>g</sup> L. 1. § 22. L. 2. h. t. (41. 2.) L. 16. de O. et A. (44. 7.).

<sup>h</sup> L. 77. de R. V. (6. 1.). Mascov de constituto possessorio. Lips. 1733. (opusc. T. 1. n. 4.). Savigny § 27. The doctrine is wholly denied by Giphanius lectur. Altorphin. p. 120. 121. 474. and partly by Pufendorf T. 1.



juridical possession of a thing to another, but nevertheless to reserve the detention or co-possession of the thing to himself, as a possessor in right of that other, can effect this by a mere contract.<sup>i</sup> Such a contract is never presumed,<sup>k</sup> except in the case of an universal partnership.<sup>l</sup>

§ 225.

**Other cases.**—Possession may be acquired in addition to the modes already mentioned in several other special ways.

1. Possession of a connected whole is acquired as soon as possession is taken of any part of it,<sup>m</sup> and consequently when a seal is placed upon it with the intention of taking possession.<sup>n</sup>

2. By depositing a thing in a house with the consent of the possessor thereof.<sup>o</sup>

3. In cases of conventional acquisition of possession, by merely pointing to the thing to be taken, provided it be visible <sup>p</sup> (*traditio longa manu*).

4. By catching in traps.<sup>q</sup>

5. In case of enclosed things, by giving up the instrument used to get at them, with the intention that it shall be so used <sup>r</sup> (*traditio symbolica*).

6. By delivering up that which evidences the right of the giver to possess.<sup>s</sup>

Obs. 10., and is termed a monstrous offspring of practice by Rosshirt Zeitschr. B. 2, p. 131—134.

<sup>i</sup> L. 18. pr. h. t. (41. 2.) L. 77. de R. V. (6. 1.) L. 28. L. 35. § 5. C. de donat. (8. 54.) cap. 9. X. de rest. spol. (2. 13.)

<sup>k</sup> L. 1. § 2. de peric. et comm. (18. 6.) L. 48. h. t. (41. 2.).

<sup>l</sup> L. 1. § 1. L. 2. pro socio (17. 2.).

<sup>m</sup> L. 77. de R. V. (6. 1.) L. 3. § 1. h. t. (41. 2.).

<sup>n</sup> L. 1. § 2. L. 14. § 1. de peric. et c. (18. 6.).

<sup>o</sup> L. 18. § 2. h. t. (41. 2.), compared with L. 9. § 3. de iure dot. (23. 3.).

<sup>p</sup> L. 18. § 2. L. 51. h. t. (41. 2.) L. 79. de solut. (46. 3.), compared with L. 3. § 3. h. t. (41. 2.).

<sup>q</sup> L. 55. de A. R. D. (41. 1.).

<sup>r</sup> § 45. I. de rer. div. (2. 1.) L. 74. de contr. emt. (18. 1.) L. 1. § 21. h. t. (41. 2.).

<sup>s</sup> It is so according to practice, L. 1. C. de donat. (8. 54.). For the different opinions see Savigny § 16. p. 244. Hufeland Geist des R. R. 1. B. 158—160. and vom Besitz. 123—126.

7. Possession is also sometimes expressly conferred by law;<sup>1</sup> such possession if it is, as is the case in several places, extended by new statutes and customs,<sup>2</sup> is termed by some *possessio civilissima*.<sup>3</sup>

### III.—CONTINUANCE AND LOSS OF POSSESSION.

#### 1. Physically.

##### § 226.

The doctrines relating to the continuance of possession naturally result from those relating to its acquisition and loss.

With respect to the loss of possession the following ought in strictness to be the rule, viz., that possession is lost as soon as either physical detention or the will to detain is at an end.<sup>4</sup> But this rule is so qualified that possession is only lost when the thing, the actual detention whereof has ceased, cannot at will be retaken, or when the will to detain it is positively abandoned. Unless one or the other happens possession continues (*animo possidemus*).<sup>5</sup>

Possession of a thing is then lost when it becomes impossible at will to reacquire the physical detention of it; and consequently;

A. When the thing itself ceases to exist; and this includes the case as well of a thing the ownership in which is changed by specification (Syst. § 286), as of a thing which has become altogether incapable of being legally possessed.<sup>6</sup>

<sup>1</sup> L. 80. de R. V. (6. 1.).

<sup>2</sup> An example is afforded by the *Scotatio* mentioned in cap. 2. X. de consuetud. (1. 4.) Compare Cuiac Obs. L. 19. c. 18. Gundlingiana P. 7. p. 168, &c. Gruppen teutsche Alterth. 1. Cap.

<sup>3</sup> Stryk de poss. instrumental. c. 1. n. 29. Struv Ex. 42. § 17.

<sup>4</sup> L. 3. § 6. 8. 13. 17. L. 15. L. 30. § 4. L. 44. § 2. h. t. (41. 2.). The statement in the text is not inconsistent with L. 8. eod. L. 153. de R. I. (50. 17.). Savigny § 30. Suse in Gurlitt animadversionum ad auctores veteres specimen 3. Hamb. 1806. p. 15—18. has attempted an emendation. Dabelow reprehensa Savignii cap. Sect. 1. p. 57—95. is quite of a different opinion, and a peculiar notion is also entertained by Zacharia Revision der L. v. Besitz. 61—64.

<sup>5</sup> L. 3. § 11. L. 27. L. 29. h. t. (41. 2.) L. 31. § 4. de usurp. (41. 3.) L. 1. § 25. de vi (43. 16.) L. 12. § 2. de reb. auct. iud. (42. 5.).

<sup>6</sup> L. 30. § 1. 4. h. t. (41. 2.).

B. When in consequence of external physical causes the thing cannot be got at;<sup>b</sup> or

C. When the thing is so lost out of our custody that it cannot be refund.<sup>c</sup> The possession of tame animals is consequently lost when they stray.<sup>d</sup> Wild animals are only possessed so long as they can be seized at will,<sup>e</sup> and tamed animals so long as they retain the habit of coming home.<sup>f</sup> Slaves, however, even when fugitive, remain in the possession of their master.<sup>g</sup>

D. Lastly, possession is in every case lost when obtained by another;<sup>h</sup> as when forcibly acquired by a stranger who is not immediately dispossessed.<sup>i</sup> According to some passages the abandonment of a thing through fear of violence applied with a view to that effect, does not amount to a deprivation;<sup>k</sup> although it is certainly otherwise if the regaining or exercise of possession be prevented.<sup>l</sup> Clandestine deprivation causes the loss of possession of moveables,<sup>m</sup> but not of immoveables unless the former possessor, as soon as he has knowledge of the fact, neglects to turn the usurper out,<sup>n</sup> or the latter is too powerful so to be dealt with; in which case however the possession of only so much as he physically occupies is lost.<sup>o</sup>

<sup>b</sup> L. 13. pr. L. 30. § 3. eod.

<sup>c</sup> L. 3. § 13. L. 25. pr. L. 44. pr. eod.

<sup>d</sup> L. 3. § 13. eod.

<sup>e</sup> L. 3. § 14. 15. eod. L. 3. § 2. L. 5. pr. § 4. de A. R. D. (41. 1.). See Kämmerer Beiträge zur Lehre v. Fischdiebstahle. Rostock 1839.

<sup>f</sup> L. 3. § 2. L. 4. L. 5. § 5. eod. L. 3. § 15. 16. h. t. (41. 2.).

<sup>g</sup> L. 13. pr. L. 15. eod. L. 15. § 1. de usurp. (41. 3.).

<sup>h</sup> In conformity with the principles in § 220.

<sup>i</sup> L. 15. h. t. (41. 2.) L. 17. de vi (43. 16.).

<sup>k</sup> L. 9. pr. quod metus (4. 2.) R. 1. § 29. L. 3. § 7. de vi (43. 16.). *Contra* L. 33. § 2. de usurp. (41. 3.). Some think these passages can be reconciled: see Hufeland v. Bes. 137—161. and Savigny § 31. p. 402—406. The newest of these fragments is preferred by Neustetel & Zimmern Unters. 1. Nr. 7.

<sup>l</sup> L. 1. § 24. 47. de vi (43. 16.).

<sup>m</sup> L. 15. h. t. (41. 2.).

<sup>n</sup> L. 3. § 7. 8. L. 6. § 1. L. 7. L. 18. § 3. L. 25. § 2. L. 46. h. t. (41. 2.). Savigny § 31. near the end.

<sup>o</sup> L. 18. § 3. 4. h. t. (41. 2.).

**2. Mentally.**

## § 227.

Possession is also lost when the possessor, being in a position lawfully to alienate,<sup>r</sup> positively<sup>q</sup> abandons his will to detain.<sup>p</sup> This is deemed to be the case when he dies without successors; neglects the possession; is without special cause absent for a long time;<sup>s</sup> and when he allows moveables to remain unguarded out of his custody.<sup>t</sup>

**3. By third persons.**

## § 228.

Possession can moreover be continued and lost by means of an agent. Here it must be observed—

A. An agent cannot by a mere resolve, himself usurp possession of the thing (*nemo causam possessionis ipse sibi mutare potest*). For that purpose some act is necessary; namely, in case of immoveables ouster of the principal;<sup>u</sup> but in case of moveables mere seizure of the thing *animo furandi*.<sup>x</sup>

B. Possession cannot be lost or transferred to another merely by the *will* of the agent. There must be on his part some physical act which according to the principles in § 226 causes loss of possession;<sup>z</sup> in such cases the physical act of the principal is unimportant.<sup>y</sup> Possession is consequently lost through an agent when he is himself ousted,<sup>a</sup> or when he permits another to take

<sup>p</sup> L. 3. § 6. L. 17. § 1. L. 34. pr. h. t. (41. 2.).

<sup>q</sup> L. 12. § 1. eod. Savigny § 32. near the end.

<sup>r</sup> L. 27. L. 29. eod.

<sup>s</sup> L. 37. § 1. de usurp. (41. 3.) L. 11. C. unde vi (8. 4.) compared with L. 4. C. h. t. (7. 32.) and Retes l. c. P. 2. c. 2. § 5. (Murman. Th. T. 7.).

<sup>t</sup> L. 3. § 13. L. 47. h. t. (41. 2.).

<sup>u</sup> L. 3. § 19. h. t. (41. 2.) L. 6. § 3. de prec. (43. 26.) compared with L. 18. pr. de vi (43. 16.). C. Comes de Reisach de antiqua regula: *nemo causam possessionis sibi ipse mutare potest*. Landsh. 1821.

<sup>x</sup> L. 3. § 18. h. t. (41. 2.) compared with L. 1. § 2. L. 67. pr. de furt. (47. 2.) Savigny § 33. Hufeland v. Besitz 137—140. See too Hugo civ. Mag. 5. B. 123—125.

<sup>y</sup> L. 1. § 45. de vi (43. 16.).

<sup>z</sup> L. 3. § 12. h. t. (41. 2.).

<sup>a</sup> L. 1. § 22. de vi (43. 16.).

possession,<sup>b</sup> but not when his will to detain is at an end or is renounced by him,<sup>c</sup> or when he merely deserts the thing.<sup>d</sup>

#### IV.—QUASI POSSESSIO.

##### § 229.

Although according to § 216, those who exercise rights *in rem* over a thing of another have not the possession of the thing attributed to them, nevertheless they are deemed to be possessors of the *right* they exercise, and are entitled to interdicts to protect that right;<sup>e</sup> but these interdicts, not relating to the possession of the whole thing, do not deprive the strict *possessor* of his juridical possession.<sup>f</sup>

Persons thus situated are termed *juris possessores* or *quasi possessores*; whilst a *possessor* in the strict sense of the word (at all events when he possesses *animo domini*) is, by way of distinction, called *corporis possessor*.<sup>g</sup>

For the acquisition of this so-called *quasi possessio* both will and a physical act are of course requisite. In case of an unilateral usurpation no right is acquired unless there be some positive act against the proprietor; or unless, if the right

<sup>b</sup> L. 40. § 1. h. t. (41. 2.) L. 33. § 4. de usurp. (41. 3.) L. 12. C. h. t. (7. 32.) See Froben on § 220. Löbenstern in Linde Zeitschrift B. 9. Nr. 13.

<sup>c</sup> L. 60. § 1. locat. (19. 2.) L. 25. § 1. L. 40. § 1. h. t. (41. 2.).

<sup>d</sup> L. 31. de dolo (4. 3.) L. 3. § 8. L. 44. § 2. h. t. (41. 2.) L. 7. pr. pro emt. (41. 4.). Hufeland v. Besitz 163—176. Savigny p. 431. 438. is of a different opinion on account of L. 12. C. h. t. (7. 32.).

<sup>e</sup> L. 2. commun. praed. (8. 4.) L. 23. § 2. ex quib. caus. maior. (4. 6.) L. 10. pr. si serv. vind. (8. 5.) L. 3. § 17. de vi (43. 16.) L. 7. de itin. (43. 19.) L. 2. § 3. de precar. (43. 26.) L. 10. C. h. t. (7. 32.). Cuperus P. 1. c. 4. Savigny § 12. 44—47. Arch. für civil. Prax. 8. B. Nr. 1. C. Albert über den Besitz unkörperl. Sachen. Leipz. 1826. Somewhat different opinions are to be found in Versuche über den Quasi-Besitz. Halle 1806. L. H. Wiederhold das interdictum uti possidetis &c. Hanau 1831. Christiansen Institutionen 194.

<sup>f</sup> L. 52. pr. h. t. (41. 2.) L. 3. § 7. uti possidet. (43. 17.).

<sup>g</sup> Vatican. Fragm. § 92. Gaius IV. 139. Theophilus L. 2. T. 9. § 4. L. 3. T. 29. § 2. L. 2. § 3. L. 6. § 2. de precar. (43. 26.) compared with L. 32. § 1. de S. P. U. (8. 2.) L. 4. § 27. de usurp. (41. 3.) L. 1. § 8. quod legator. (43. 3.). Buchholtz Versuche Nr. 8.

be of a negative character, his acts are effectually opposed. In case of acquisition by a bilateral transaction, if the right be negative it is acquired by the transaction itself, but if positive only by the commenced exercise thereof (*quasi traditio*).<sup>b</sup>

*Quasi possessio* is lost by the impossibility of renewing at will the exercise of the right, or by abandonment of the intention to possess.<sup>i</sup>

The Canon and German laws have, as will hereafter appear, (§ 237—239) to a certain degree extended these doctrines to those who exercise rights *in personam* over things and to other cases.

## V.—CONSEQUENCES OF POSSESSION.

### 1. General.

#### § 230.

The consequences of possession are partly general, and so far essential to all kinds of possession, and partly special.

The general consequence of possession is that every possessor (in a wide sense) must be left in his actual state until some other person brings forward superior grounds, which show that such actual state ought to be transferred to himself.<sup>k</sup> The person in possession, therefore, is not called upon to show his title, i.e. to declare the legal foundation of his possession;<sup>l</sup> the burden of proof is not upon him, and in cases where evidence is evenly balanced he succeeds.<sup>m</sup> The burden of proof is, however, thrown on the person in possession (at least according to the opinion of most practitioners) when he seeks by virtue of his possession to encroach

<sup>b</sup> L. 3. pr. de usufr. (7. 1.) L. 20. de servit. (8. 1.) L. 6. § 1. si servit. vindic. (8. 5.) Hufeland v. Besitz. 81. 82. Savigny § 46. § 47. Heisler in his examination of the question whether negative servitudes can be acquired by mere contract without transfer (in his Abh. Halle 1783. 1. Th. Nr. 3.) expresses an opinion different from the above, and maintains that a *quasi traditio* is necessary.

<sup>i</sup> L. 12. § 4. de usufr. (7. 1.).

<sup>k</sup> L. 5. pr. si usufr. pet. (7. 6.) L. 2. C. de cond. ob turp. caus. (4. 7.).

<sup>l</sup> L. 11. C. de pet. hered. (3. 31.) L. 24. de R. V. (6. 1.) L. ult. C. eod. (3. 32.). S. Stryk de necessitate edendi titulum poss. Frkf. ad V. 1688.

<sup>m</sup> L. 8. 14. de probat. (22. 3.) L. 4. de edendo (2. 1.) L. ult. C. de R. V. (3. 32.). S. Stryk de possidente non meliore. Frkf. ad Oderam, 1687.

upon the essentially unrestricted rights of another who opposes such attempt.<sup>a</sup>

To protect possession, every person therein has the right extra-judicially to defend himself,<sup>o</sup> and judicially to meet his opponent with an *exceptio*,<sup>p</sup> and in certain cases to institute proceedings against him. How far mere possession is a ground for actively instituting proceedings can only be ascertained from the law of interdicts, which are special consequences of possession. In this place it is simply necessary to state that no one is in a position, merely because he *previously had* possession of a thing, to demand it by an *actio in rem* against third persons, and that consequently the rights which flow from possession (*jus possessionis*) are not *in rem* but *in personam* <sup>q</sup> (§ 64.)

## 2. Special.

### § 231.

The special consequences of possession are, that in some cases a possessor is entitled to the produce of the things of another, and by seizure or continued possession gains the ownership of the thing possessed; but this will be best examined with the law of property. The only special consequences requiring further development in this place are the right of retention<sup>r</sup> (*lien*), and possessory interdicts.

## A. RIGHT OF RETENTION.

### § 232.

**Lien.**—*Lien (jus retentionis)* is a right to detain a thing until a demand is satisfied.<sup>s</sup>

<sup>a</sup> C. Thomasius de onere probandi in actione negatoria. Hal. 1716. Hufeland Beitr. zur Ber. d. pos. R. 4. St. Nr. 10. Grolman & Löhr Magaz. 3. B. 507—512. But see L. 5. § 1. si ususfr. pet. (7. 6.) L. 6. § 1. L. 8. § 3. si serv. vind. (8. 5.) L. 15. de nov. op. nunc. (39. 1.). Weber Beitr. zu der Lehre v. d. Kl. u. Einr. 2. & 3. St. Nr. 16. K. C. W. Klötzer Vers. eines Beitrags zur Bericht. d. Lehre v. d. Beweislast. Jena 1813. Franke im Arch. f. civ. Prax. B. 21. p. 32.

<sup>o</sup> Ante § 61. compared with § 226. near the end.

<sup>p</sup> L. 5. pr. in fin. si ususfr. pet. (7. 6.).

<sup>q</sup> Thibaut Versuche 2. B. 61—66.

<sup>r</sup> Some are of a different opinion. E. Wippermann das gemeine deutsche Recht. Heft 1. Leipz. 1839. p. 36.

<sup>s</sup> I. P. Heisler de iure retent. Hal. 1751. (Exerc. 1. n. 2.). G. L. Boehmer de

If this right is the consequence of a contract or a testamentary disposition (*jus retentionis conventionale, testamentarium*), its limits as fixed thereby must be observed.

If, however, the right exists independently of permission (*jus ret. legale*) the demand, on account of which the thing is sought to be kept back, must relate in some way to the thing (*debitum connexum*). The right exists in the following cases.—

A. When a person in possession of a thing has made useful or necessary<sup>1</sup> outlays upon or respecting it.

B. When the recovery of a thing from its possessor is sought by an *actio directa* he can retain it until he is satisfied all the demands upon which he could ground an *actio contraria* (Syst. § 402); even although such demands are not of the nature mentioned in the preceding paragraph;<sup>2</sup>

C. So also can a person who has a right himself to satisfy his demands out of the thing he possesses.<sup>3</sup> This sort of lien is said to be qualified (*jus ret. qualificatum*) by way of distinction from other sorts which are said to be simple (*jus ret. simplex*).

D. He who is bound to deliver a thing up in consideration of some act to be performed, may detain the thing until performance.<sup>4</sup>

E. The retention of a thing is also lawful by one who has by it suffered a loss which the owner is bound to make good.<sup>5</sup>

F. Pledge holders have, in case of a valid *pignus*, the general

*iure retent. eiusque effectu*. Goetting. 1774. (Elect. T. 2. n. 13.). I. L. Schmid de iis, quae ad exercend. ius retent. sunt necessar. Ien. 1785. J. C. W. Fasellius syst. Darstellung d. Lehre vom Ret. R. 2nd. edn. Hal. 1793. C. W. Schenck d. Lehre v. d. Retentionsrecht. Jena 1837. K. Luden das Retentionsrecht. Lpz. 1839.

<sup>1</sup> L. 2. pr. ad L. Rhod. de iact. (14. 2.) L. 1. C. si aliena res pignor. (8. 16.) L. 27. § 5. L. 48. de R. V. (6. 1.) L. 21. § 2. de donat. inter V. et U. (24. 1.) L. 53. § 4. de furt. (47. 2.).

<sup>2</sup> L. 18. § ult. commod. (13. 6.) L. 1. pr. quib. mod. pign. vel hypoth. (20. 6.) L. 8. pr. de pign. act. (13. 7.) L. 2. pr. de lege Rhodia (14. 2.).

<sup>3</sup> L. 9. in quib. causis. pign. (20. 2.) L. 29. C. de iure dot. (5. 12.). See Luden § 23.

<sup>4</sup> L. 13. § 8. de act. E. V. (19. 1.) L. 26. § 4. de cond. indeb. (12. 6.). This is referred by some to a tacit understanding. Against such distinctions see Luden § 8.

<sup>5</sup> L. 9. § 3. de damn. inf. (39. 2.) L. 8. de incendio. ruin. naufr. (47. 9.).



right to retain a thing until all their demands, whether connected therewith or not, are satisfied ;<sup>a</sup> this right, however, is not to be extended to others.<sup>b</sup>

With respect to the disputed question, whether the demand of the person retaining must be clear,<sup>c</sup> the only answer which can be given is, if he be required by ordinary process to give up the thing he can insist upon being left to the proof of his *exceptio*. If, however, he be sued by summary process, in which uncertain *exceptiones* as a rule are not regarded, then his demand must be clear.

A concurrence of creditors, moreover, does not deprive a person in possession of any advantage which he may have by virtue of a right of retention.<sup>d</sup>

## B. INTERDICTS.

### a. Roman.

#### § 233.

Possessory interdicts (§ 63) have for their object the acquisition of a possession never as yet enjoyed (*int. adipiscendæ possessionis*), or the protection of a disturbed possession (*int. retinendæ possessionis*), or the restoration of a lost possession (*int. recuperandæ possessionis*).<sup>e</sup> The two latter only can be reckoned amongst the *consequences* of possession.<sup>f</sup> These interdicts are founded solely upon possession, and no *exceptio* raising a question of right has ever to be considered.<sup>g</sup> It is only occasionally that in interdicts of this sort the plaintiff has also to prove his right to possess ;

<sup>a</sup> L. un. C. etiam ob chirogr. pec. (8. 27.).

<sup>b</sup> L. ult. C. commod. (4. 23.) L. 11. C. depos. (4. 34.). Müller ad Leyser Obs. 368. But see Schweppe Röm. Priv. R. 1. B. § 183. d.

<sup>c</sup> Compare Stryk de possess. per caut. non auferenda cap. 2. § 15. 17. Pufendorf T. 2. Obs. 130. Fasilius § 10.

<sup>d</sup> Opinions differ much on this point. Compare Gönner Handb. 4. B. Nr. 82. § 10. Götz Entscheidungen d. Facult. Altorf. Nr. I. Pfeiffer pract. Ausf. 2. B. Nr. III. Gans Zeitschr. 1. B. Nr. 28. Spangenberg in Lunde Zeitschr. 1. B. Nr. 6. 5. B. Nr. 13.

<sup>e</sup> § 2. I. h. t. (4. 15.) I. 2. § 3. h. t. (43. 1.).

<sup>f</sup> Savigny § 35.

<sup>g</sup> L. 4. I. h. t. (4. 15.) I. 1. § 3. uti poss. (43. 17.). Leyser Sp. 499. m. 4. 5.

when such is the case the interdict is termed mixed (*int. mixtum*).<sup>b</sup> In a general theory of possession those interdicts *retinendæ et recuperandæ possessionis* only have to be considered, which are not confined to certain special cases.

## a. RETINENDÆ POSSESSIONIS.

## § 234.

For the protection of a possession not lost<sup>k</sup> but disturbed, otherwise than by special permission (*remissio*),<sup>i</sup> the Roman law provides as an *interdictum duplex*<sup>l</sup> (§ 63), in the case of immovables, the interdict *uti possidetis*,<sup>m</sup> and, in the case of moveables, the interdict *utrubi*,<sup>n</sup> which is now precisely similar to the other.

The plaintiff here is the person disturbed; he must be a juridical possessor in his own right, and must be in possession at the time of the institution of the interdict.<sup>o</sup>

The defendant is he who caused the disturbance, but not, according to Roman law, his heir as such.<sup>p</sup>

The decree prohibits further disturbance, and awards damages, and a *cautio de non amplius turbando*.<sup>q</sup>

If the defendant sets up and proves by way of *exceptio* that the plaintiff obtained possession from him *vi, clam aut precario*,<sup>r</sup> (an

<sup>b</sup> For example L. 3. § 13. de itinere (43. 10.). *Mixta* is a word sometimes also applied to the *duplicita*, ante § 63.

<sup>i</sup> Tit. D. remission. (43. 25.).

<sup>k</sup> L. 1. § 4. L. 3. § 2. 3. 4. h. t. (43. 17.) L. 11. de vi (43. 16.). Especially Savigny § 37. 38. 39. C. Albert über das interdictum uti possidetis. Halle 1824. Archiv für civil. Prax. 6. B. 270—277. Some peculiar views are taken by L. H. Wiederhold das interdictum uti possidetis &c. Hanau 1831.

<sup>l</sup> § 7. I. h. t. (4. 15.) L. 2. pr. de interd. (43. 1.) L. 3. pr. § 1. h. t. (43. 17.) L. 37. § 1. de O. et A. (44. 7.).

<sup>m</sup> Zeitschr. f. geschichtl. Rwiss. B. 11. Nr. 9. 10. Weiske Rechtslexikon B. 5. 627.

<sup>n</sup> § 4. I. h. t. (4. 15.) L. un. § 1. utrubi (43. 31.) Puchta Coursus der Institut. 2. B. p. 508—510. Weiske Rechtslexikon B. 5. 633.

<sup>o</sup> § 4. I. L. un. § 1. cit. L. 1. § 4. L. 3. § 8. h. t. (43. 17.). Vangerow Leitfaden § 336.

<sup>p</sup> Ante § 71. and Schmidt v. Klagen § 170.

<sup>q</sup> L. 1. pr. L. 3. § ult. h. t. (43. 17.) L. un. C. uti poss. (8. 6.). F. C. Conradi cautio de non ampl. turb. in iudic. possessoris usu fori recepta. Helmst. 1737.

<sup>r</sup> L. 1. pr. § 5. 9. L. 3. pr. § 10. h. t. (43. 17.).

*exceptio* which, in certain cases, may be strengthened by the fact that the defendant had an older and better possession,) the plaintiff is himself to be condemned as if he were the defendant.<sup>5</sup> In this as well as in the following interdicts, the defence of lapse of time (§ 207) must not be forgotten.

# B. RECUPERANDÆ POSSESSIONIS.

## § 235.

For the restoration of a lost possession, the Roman law provides the person dispossessed with the interdict *unde vi* or *de vi simplici s. quotidiana*, if he be not dispossessed by force of arms, and with the interdict *de vi armata s. publica*<sup>1</sup> if he be. Those interdicts are alike in every respect, except this, that the former does not lie against persons to whom reverence is due.<sup>2</sup>

The plaintiff here may be any person who being in possession of an immoveable thing is directly or indirectly deprived of such possession.<sup>3</sup> Whether the plaintiff was in possession in his own or in another's right is immaterial;<sup>4</sup> but he will not succeed if he himself, although by duress, gave up possession to the defendant.<sup>5</sup> Moreover possession of moveables is not thus recoverable except incidentally along with an immoveable upon which they may be.<sup>6</sup>

<sup>1</sup> Cap. 9. X. de probat. (2. 19.). Langenn and Kori Erörter. 2 B. Nr. 21. Bayer summar. Proc. 2. edn. 184—188. Bolley vermischte jurist. Aufs. 1. B. Nr. 9. Sintenis Civilrecht. B. 1. § 46. Not. 19.

<sup>2</sup> Rubr. Tit. D. de vi et vi arm. (43. 16.) et L. 1. § 43. ibid. § 6. I. de interdict. (4. 15.). Generally H. C. Cras Diss. qua specim. iurispr. Ciceronis exhibet s. Ciceronem iustam pro Caecina causam dixisse ostenditur. Lugd. B. 1769. F. G. Fleck comm. binæ de interd. unde vi et remedio spoli. Lips. 1797. Savigny § 40.

<sup>3</sup> L. 1. § 43. h. t. (43. 16.).

<sup>4</sup> L. 1. § 9. 10. 23. eod., comp. with L. 1. C. si per vim (8. 5.) On account of the difference of opinion with respect to the meaning of *possessio naturalis* and *civilis*, the above statement is contested. See the works cited in § 217. notes d. & f. Geiger in Linde Zeitschr. B. 13. Nr. 10.

<sup>5</sup> L. 5. h. t. (43. 16.) L. 9. pr. quod met. caus. (4. 2.).

<sup>6</sup> L. 1. § 3. 29. 45. h. t. (43. 16.).

<sup>7</sup> L. 1. § 3—8. 33. L. 3. § 15. eod. Notwithstanding L. 34. C. locat. (4. 65.) L. 7. L. 10. C. unde vi (8. 4.). Archiv für civilist. Praxis 1. B. 105—111. Linde Zeitschr. 1. B. 418—421. I. A. Fritz respons. ad quaest. quam actionem constitutio L. 7. C. unde vi—concedat. Friburg. 1828. Puchta Coursus der Inst. 2. B. 512. Weiske Rechtslexikon 5. B. 583. See Savigny § 40. p. 529—535

This interdict now also lies when possession, lost by absence, is obtained by another.<sup>b</sup>

The defendant is he from whom the violence either mediately or immediately proceeds;<sup>c</sup> but never a third possessor or an unenriched heir.<sup>d</sup>

The end obtained is restitution of possession with all accessories; but full compensation only for the period of one year.<sup>e</sup>

The *exceptio* that the plaintiff obtained possession from the defendant *vi, clam aut precario*, is not here admissible.<sup>f</sup>

There was formerly an *interdictum de clandestina possessione*, but this is now obsolete, as clandestine usurpation no longer terminates possession.<sup>g</sup>

#### 7. INTERDICTUM MIXTUM.

##### § 236.

If possession is awarded to a person but its acquisition or continuance is fraudulently prevented, or if possession is wrongfully usurped by another, the person aggrieved has a general interdict *ne vis fiat ei qui in possessionem missus est*, which, according to circumstances, can be *adipiscendæ*, *retinendæ* or *recuperandæ possessionis*.<sup>b</sup> With respect to the plaintiff, defendant and object, it agrees with those already mentioned.<sup>i</sup> There are, however, the special grounds of defence, that there has been no fraud on the part of the defendant, or that there is no legal ground for awarding possession to the plaintiff.<sup>k</sup>

<sup>b</sup> L. ult. C. h. t. (8. 4.). Savigny § 43.

<sup>c</sup> L. 1. § 12—15. L. 3. § 10. 11. 12. h. t. (43. 16.).

<sup>d</sup> L. 1. § 48. L. 2. L. 3. pr. L. 9. eod. L. 3. § 10. uti poss. (43. 17.) L. 11. C. de A. et A. P. (7. 32.).

<sup>e</sup> L. 1. pr. § 31. 39. 40. 41. L. 6. de vi (43. 16.) L. un. C. si per vim (8. 5.).

<sup>f</sup> § 6. I. de interd. (4. 15.).

<sup>g</sup> L. 7. § 5. comm. divid. (10. 3.), compared with Savigny § 41.

<sup>h</sup> L. 1. pr. § 1. 2. 3. h. t. (43. 4.). Weiske Rechtslexikon B. 5. p. 597.

<sup>i</sup> L. 1. § 5. 8. L. 2. L. 4. § 2. 3. eod.

<sup>k</sup> L. 1. § 4. 5. 6. eod.

b. *Modern Extensions.*

## a. REMEDIUM SPOLII.

## § 237.

Many important extensions and modifications have been introduced by the Canon and German law, and by practice.

For the reacquisition of a lost possession<sup>1</sup> a new remedy, *remedium spoli*, owes its introduction to the Canon law. This remedy may be used actively (*actio spoli*) or passively (*exceptio spoli*) and although not essentially different from the interdict *unde vi* is nevertheless distinguished from it by certain peculiarities in procedure and by having a more extensive application. For—

a. Every person can avail himself of it who actually being in possession in the widest sense of the word<sup>m</sup> is in any way, fraudulent or not, disturbed therein: and it is immaterial whether this possession or quasi-possession, in the most general sense, be exercised by virtue of a right *in rem* or *in personam*, or whether it be taken away by force or given up through fear, or whether its object be moveable or immovable.<sup>n</sup>

b. The remedy lies in every case against the heir,<sup>o</sup> and even against third parties who acquire the thing with notice of the *spolium* but not against third parties in *bona fide*.<sup>p</sup>

3. It is also available against persons to whom reverence is due.<sup>q</sup>

<sup>1</sup> The following laws show that this remedy is not a *remedium retinendae possessionis*. Danz summar. Proc. § 11. Müller ad Leyser Obs. 834. *contra* Struben 1. B. 142. Bed. See generally I. H. Boehmer I. E. P. L. 2. T. 13. Idem de depravato except. spoli statu (Exerc. T. 5.). Fleck comment. cit. p. 81. Woltaer Obs. iur. Fasc. 2. c. 35. Savigny § 60.

<sup>m</sup> The possession must be specially justified if it be illegal by *general* law, cap. 2. de restitut. spoliator. in 6. (2. 5.).

<sup>n</sup> cap. 2. 3. 4. 8. 10. 13. X. de restitut. spoliator. (2. 13.). Pufendorf T. 2. Obs. 142. Fleck l. c. p. 97—99. 108—110. Hufeland v. Besitz 75—83.

<sup>o</sup> cap. 5. X. de raptor. (5. 17.).

<sup>p</sup> c. 3. C. 3. qu. 1. cap. 18. X. de rest. spol. (2. 13.) cap. 1. § 1. eod. in 6to (2. 5.). Boehmer I. E. P. l. c. § 7—11. 16. 17. I. U. Cramer opusc. T. 3. p. 91. *Contra* Mevius P. 4. Dec. 69. P. 8. Dec. 383.

<sup>q</sup> cap. 7. X. de restitut. spol. (2. 13.).

## B. POSSESSORIUM SUMMARISSIMUM.

## § 238.

In order to prevent violent proceedings, when two parties claim possession of a thing, the judge is, by the German law,<sup>r</sup> required, with or without request, to interfere and, if need be, to sequester the thing, or to award it provisionally to one of the parties and to proceed herein as summarily as possible; but the right to institute a possessory or petitory action (*possessorium* and *petitorium*) must be reserved to the yielding party.<sup>s</sup> This proceeding is called from its peculiar rapidity *possessorium summarissimum*, or merely *summarium*. The proceeding mentioned in § 234, relating to the preservation of possession, and in which the ordinary course of the summary process is followed, is termed *possessorium ordinarium* or, by way of distinction from *summarissimum*, *possessorium summarium*. In the former, attention is only paid to the last possession, but in the latter, the kind, legality, and date of the possession have to be enquired into. This division into *possessorium ordinarium* and *summarium* is only used with reference to the remedies *retinendæ possessionis*; <sup>t</sup> the other possessory remedies are however also obtained sometimes in the ordinary course of the summary process, and at others by the imperfect summary procedure.

## § 239.

The form of the *summarissimum*, as well as much that relates to its nature, is left undetermined by law. Having regard to the main object of the remedy and the practice with respect to it, the following rules may be laid down.

1. Assistance must be given provisionally, without any enquiry as to the goodness of the possession, to him who can show that he, even for only a short time,<sup>u</sup> was last in possession in the widest

<sup>r</sup> K. G. O. v. 1555. Th. 2. Tit. 21. § 3.

<sup>s</sup> See generally Boehmer diss. de vero usu remedii possessorii (Exerc. T. 5.) cap. 3. Savigny § 51.

<sup>t</sup> Boehmer Diss. cit. cap. 3. § 5. Müller ad Leyser Obs. 822.

<sup>u</sup> Boehmer l. c. § 8. Berger elect. process. poss. § 22. and others think that possession for a year is necessary.

sense of the word, and that he has been disturbed (for this is sufficient to give rise to fear of violence); consequently a subject must here be protected against the Prince.<sup>x</sup>

2. Imperfect evidence must be acted upon.<sup>y</sup>

3. The right to institute a possessory or petitory action must be reserved to the unsuccessful party, and, if proper, he must be ordered to pay costs,<sup>z</sup> and to take an oath not to disturb his opponent.<sup>a</sup>

<sup>x</sup> Leyser Spec. 499. m. 8. 9. Müller Obs. 824., compared with Thibaut's *Schrift über Besitz und Verj.* 2 Th. § 75. Of a different opinion is Danz *summar. Proc.* § 16.

<sup>y</sup> Boehmer l. c. § 10. Schaumburg princ. I. 2. c. 4. § 8. Danz *loc. cit.* § 17.

<sup>z</sup> Compare Danz § 16. with Hommel rhaps. Obs. 884.

<sup>a</sup> Schaumburg l. c. § 10. not. 5.

## NOTES AND ILLUSTRATIONS.

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### NOTE TO § 1.

#### 1. Law.

A LAW, in the loosest and most general sense of the word, is the expression of some necessity physical or moral. Thus we hear of the laws of gravity, laws of nature, laws of honour, &c. A little consideration is sufficient to show that those laws which express a physical necessity have very few, if any, characters in common with laws which express a necessity merely moral. A law of nature is nothing more than a concise statement of what is found to be true under certain conditions. Such a law admits of no infringement. If in any particular case, falling within the so-called law as expressed, that law does not hold good, the law is in fact disproved, and the general truth common to the cases previously observed must be stated with the necessary correction. The so-called laws of nature are ascertained sequences of phenomena, to which the term law is applied by metaphor.

A law, in a more restricted and correct sense, is a command, actual or inferred, obliging intelligent beings to some acts or forbearances of a class. Laws in this sense are evidently capable of infringement, and may all be expressed in the shape of an alternative, viz., Obey or disobey and take the consequences. Not that a person to whom the law is addressed can, as tried by it, lawfully take which alternative he likes, but physically he can, and this circumstance by itself serves to distinguish the so-called laws of nature from commands real or supposed, to which the term law must be confined if confusion is to be avoided. It is not, however, with all laws, even in this more restricted and correct sense, that a Jurist has as such to deal. Laws are divisible into several great divisions according to the sources from which the commands proceed or are supposed so to do. Thus we have—

I. LAWS DIVINE, i.e. commands proceeding, or supposed to proceed, from the supreme Deity.

II. LAWS HUMAN, i.e. commands proceeding from some person or body of persons: and these again are

1. *Improper*, if they proceed from persons who do not, as political superiors, issue them to others (e.g. laws of honour, fashion, &c.).

2. *Proper*, if they proceed from political superiors as such.



Human laws proper and a certain small section of human laws improper (International Law) alone form the subject matter of a treatise on Jurisprudence. And by the word law is meant, unless it be otherwise expressed, a human law proper, i.e. a command issuing from a political superior and obliging generally to acts or forbearances of a class.<sup>a</sup>

## 2. Subject, Object.

A clear perception of the meanings of the words subject and object, which so often occur in the present work, is absolutely necessary for the complete understanding of the text.

The words are imported from the writings of Kant and his followers. In their language *subject* denotes the perceptive faculty—*Das Ich*, *Ego*, and *object* denotes whatever that faculty is exerciseable upon—*Das Nicht Ich*, *non ego*. That is taken subjectively which is considered with reference to the percipient faculty; that is taken objectively which is not so considered. As stated by a writer in the *Penny Cyclopædia* (art. *Subject*),

“The subject is in Philosophy invariably used to express the mind, soul, or personality of the thinker—the *Ego*. The object is its correlative and uniformly expresses anything or everything external to the mind; everything or anything distinct from it—the *non Ego*. . . . Besides its primary signification, object became metaphorically motive, end, final cause, &c. . . . Subject became also synonymous with object.”

## 3. Jus.

The word *jus* in Latin, like *Droit* in French, and *Recht* in German, has two meanings, each of which is in English designated by a different term. *Jus*, *Droit* and *Recht* mean first *law* and second *a right*. *Jus*, *Droit* and *Recht* in the sense of law are not synonymous with *lex*, *loi*, *Gesetz*, which answer to what in English is called *a law*, and which, like it, are used to denote a law in its most loose as well as in its proper juridical sense. *Jus*, *Droit*, *Recht* in the sense of law mean a body of *leges*, *lois*, *Gesetze* which proceed from the same law-giving power, and are collected so as to form a whole complete in itself. This is the meaning of the words in such expressions as *jus pontificum*, *Canonicum*, *gentium*, *civile*, &c.; *Droit romain*, *français*, &c.; *Privat-Recht*, *Staats-Recht*, &c. This sense of the words *Jus*, *Droit*, *Recht*, is what the Germans mean to convey when they make use of the expression *Jus*, *Recht im objectiven Sinn*.

*Jus*, *Droit*, *Recht* may also signify a right. When either *droit* or *Recht*

<sup>a</sup> Upon the subject of the above note the reader is particularly referred to the admirable *Province of Jurisprudence determined*, by JOHN AUSTIN, London, 1832, a work wholly free from those mista which too often prove impenetrable to the student of writings on the philosophy of law.

is used in this sense, it is always preceded by the indefinite article; whilst when used in the sense of law, the definite article is always employed. There being no such mark whereby to know in which sense the word *jus* is to be taken, opinions occasionally differ. A notable instance of this is afforded by the expression made use of in I. Inst. tit. 3 *de jure personarum*; Blackstone and some others translating it "of the *rights* of persons," and then, for the sake of apparent logical harmony, talking of the "*rights* of things," expressions still made use of, although the blunder has long since been exposed.<sup>a</sup> A right is what is intended to be denoted by the German expression, *jus*, *Recht im subjectiven Sinn*.

It is curious that whilst the English have only one word (law) to denote the ideas conveyed by *jus* and *lex*, *Recht* and *Gesetz*, *Droit* and *loi*, the Romans, Germans, and French have but one word to convey the meanings attached to the English words law and right.

#### 4. Duty.

It is said in the text *jus et obligatio sunt correlata*, but this is not true if by *obligatio* be meant duty in its widest legal sense. Duties are divisible into absolute and relative, the former having no rights properly speaking correlative to them. The correlative of an absolute duty is rather the might of the lawgiver who imposes the duty than any right conferred by the law upon a third person. Examples of absolute duties are those which persons are under to pay taxes, refrain from smuggling, not to commit treason, suicide, &c. Although, therefore, every right has its correlative duty, every duty has not its correlative right.<sup>b</sup> The apparent rights correlative to absolute duties are nothing more than means appointed by the lawgiver for their enforcement, and are very often themselves absolute duties; e.g. of a person feloniously assaulted it is more correct to say that he is bound than that he has a right to prosecute.<sup>c</sup>

#### NOTE TO § 5.

##### Thibaut's System.

In the 9th edition of Thibaut's System the learned editor altered the arrangement of the author, and, dividing his last book into two and incorporating the appendix on prescription with the body of the work, distributed the matter thus—

I. General Principles—Book I.

II. Special Principles relating to—

<sup>a</sup> See Austin *appx.* XVI., XIX.; 2 Thibaut's *Versuche*, p. 1.

<sup>b</sup> See Austin, *ub. sup.* 25. and *appx.* p. V. LVII.

<sup>c</sup> 4 Bl. Com. 134, 136, 293; *Per* Wilmot, C. J., in *Collins v. Blanton*, 1 Sm. L. C. 164.

1. Property—Book II.
2. Obligations—Book III.
3. Family—Book IV.
4. Successions—Book V.

This arrangement is in accordance with the views of most modern German writers, but whether it is better than that of the author is at least doubtful; and the fifth § in the 9th edition not being written by Thibaut, the translator has deemed himself justified in reproducing in the text the last classification of the author and in the present place that of his editor.

#### NOTE TO § 6.

#### Roman Systems.

The Institutes \* of Justinian are thus divided—

- I. *Jus personarum.* Lib. I. tit. 3—26.
- II. *De rebus.* Lib. II.—Lib. III. tit. 12.
- III. *De obligationibus.* Lib. III. tit. 13.—Lib. IV. tit. 5.
- IV. *De actionibus.* Lib. IV. tit. 6—18.

Upon this classification much has been written, the principal controversy relating to—

1. The meaning of the *jus personarum*.
2. The arrangement of the three last subjects.

That the expression *jus personarum* means the law of persons and not the rights of persons has been shown by Thibaut in a very masterly essay, published in the 2nd vol. of his *Versuche*. "The *jus personarum* treats of the differences of persons so far as these differences have any influence on rights and duties, whilst the *jus quod ad res pertinet* treats of things and is divisible into two parts, namely, the doctrines relating to things corporeal and the doctrines relating to things incorporeal. To the last division belongs the whole law of rights and their correlative duties, for they are species of things incorporeal. The *jus personarum* should consequently be confined to the juridically important differences of persons, being neither rights nor duties, whilst the law of things should comprise the whole of the legal doctrines relating to things and should especially deal with one kind of them, namely, rights and their correlative duties." 2 *Thib. Vers.* 6 & 7. For other views as to the limits of the *jus personarum*, see 1 *Savigny System*, § 59.

With respect to the arrangement of the three last divisions of the Institutes some writers contend that the 3rd and 4th divisions should be

\* An elaborate analysis of the Institutes is given by Profr. Böcking in his valuable edition of *Gaius*.

blended into one distinct class, whilst others more justly contend that they should be blended together as a branch of the 2nd, so as to make the classification as follows—<sup>a</sup>

I. De personis.

II. De Rebus { corporalibus.  
incorporalibus including Justinian's 3rd and 4th divisions.

The Digest is arranged upon no scientific plan, if upon any plan at all. The following is an outline of its contents.

First come some general matters in Lib. I. tit. 1—8;

Second are the doctrines relating to civil process and defences by pacts, accord and satisfaction, and restitution. Lib. I. tit. 9. to Lib. V. tit. 1.;

Third are placed the laws relating to the subject matter of process, viz.—

1. Actions in rem. Lib. V. tit. 2. to Lib. VIII. tit. ult.

2. Actions in personam as they arise from contracts and delicts. Lib. IX. tit. 1. to Lib. XIX. tit. ult.

Fourth are three books XX. to XXII., containing many matters important in cases of contract, but nevertheless of much more extensive application.

Fifth are the doctrines relating to marriage, guardianship, succession and slavery.

Last is placed a mixture of laws on obligations, property, interdicts, extinguishment of duties, appeals, criminal and state matters.

The plan of the Code is not essentially different from that of the Digest.<sup>b</sup>

NOTE TO § 7.

1. *Jus Gentium*, &c.

In the writings of the Roman lawyers three divisions of *jus* are mentioned, viz., *naturale*, *gentium*, *civile*. Of these the *jus gentium* and *jus naturale* appear to have been in fact identical; for although Ulpian (l. 1. § 2. 3. 4. l. 4. l. 6. pr. de J. et J. I. tit. 1) treats the three as distinct, the better opinion is that he did so for some philosophical reason of his own, and that the dichotomous division into *jus civile* and *jus gentium* (or *naturale*) was alone practically recognised by the Romans. See the 1st appx. to the 1st vol. of *Savigny's System*.

The *jus gentium sive naturale* was not a system of natural law built by reasoning from certain abstract principles, nor was it dependent on the arbitrary opinions of those who administered it, but it was that which was developed gradually by being moulded upon the moral notions of the age,

<sup>a</sup> 1 Sav. Syst. § 59.; 1 Mühl. Pand. § 78.

<sup>b</sup> Braun's Erör. § 7.

and so adapted to different circumstances as they arose. It grew into importance step by step with the state itself; by it were the transactions of *peregrini* with each other or with Roman *cives* governed, and it was a sort of compromise between the strict *jus civile* which was applicable exclusively to the latter, and the growing spirit of the age which demanded that *peregrini* should be considered as capable of enjoying rights. The *jus gentium* became in course of time to be considered as an integral part of the Roman law, many of its principles being gradually incorporated therewith, and obtaining force and effect in the transactions of Roman *cives* themselves. 1 *Puchta Inst.* § § 83—5 : *Froben* § 7.

As a general rule the *jus gentium* could only be taken advantage of by a plea or *exceptio*. *Thib. Syst.* § 8 : 1 *Puchta Inst.* p. 363.

*Jus Civile* was the term given by the Romans to the greater portion of the *jus publicum Romanum*, to the laws regulating *agnatio*, marriage, *patria potestas*, all Roman formal transactions (including verbal contracts and testaments) and succession on an intestacy.

As *jus gentium* they considered certain portions of the *jus publicum*, viz., the *jus belli*, treaties, *jus postliminii*, inviolability of ambassadors, reverence for the Gods, obedience to political superiors, punishment for *furtum*, *homicidium*, *adulterium*, incest with lineal ascendants, injuries : also the right of self defence, slavery, concubinage, rights of parents to sustenance, duty of maintaining near relations, succession to the property of children dying intestate, acquisition of property by occupation, accession and tradition, and lastly all informal contracts.\*

## 2. Civil Law.

By *jus civile* in its most extensive sense the Romans appear to have denoted what is in modern times usually designated positive law. Of civil law in this sense no better definition can be given than that to be found in the admirable 26th chapter of the 2nd part of *Hobbes' Leviathan*, a production which, in spite of its unenviable notoriety and certain inadmissible doctrines, well deserves the attention of every student of Jurisprudence.

"By civil laws I understand the laws that men are therefore bound to observe because they are members not of this or that Commonwealth in particular, but of a Commonwealth." \* \* \* "I define civil law in this manner: Civil law is to every subject those rules which the Commonwealth hath commanded him by word, writing, or other sufficient sign of the will to make use of for the distinction of right and wrong; that is to say of what is contrary and what is not contrary to the rule."

\* Braun's *Erör.* § 1.

## NOTE TO § 9.

**Moral Duties.**

By the law of England all duties founded upon moral notions of right and wrong cannot be actively enforced. A mere promise imposes upon the person making it no obligation capable of being enforced by action,<sup>a</sup> unless such promise be founded upon some consideration, or be evidenced by a formal deed.<sup>b</sup> Nevertheless duties merely moral are not ignored. A person who promises to perform a duty, once but no longer capable of being actively enforced by legal proceedings, can without any fresh consideration or a formal deed be sued upon that promise;<sup>c</sup> and courts of Equity by a liberal application of the maxim "he who will have Equity must do Equity" often compel a plaintiff seeking relief to do that which by the current notions of morality he ought, although he could not be compelled so to do by any action or suit instituted against him.<sup>d</sup>

What moral duties are at the same time legal ones and what are not cannot be stated in any general proposition.

## NOTE TO § 11.

**Void Laws.**

The rules and precepts contained in the Old and New Testaments are, if binding *as law* at all, only so by virtue of their incorporation and adoption into our statutes and body of customary law, and consequently have no more force *as law* than any ordinary statute or legally valid custom.<sup>e</sup> Hence any rule or precept in the Bible ceases to be binding *as law* when opposed either to an act of parliament or to an existing valid custom; and when it is said<sup>f</sup> that the Divine law is above all law, all that can be reasonably meant is, that in a religious or moral point of view a person is justified in disobeying a positive law if opposed to the law Divine. A person disobeying a positive law clearly does wrong in a legal point of view for that law is the sole legal standard of right and wrong; and consequently a judge who ignores a clear positive law because it is opposed to what is, or is supposed by him to be, a law of God does that which is, juridically speaking, unlawful, however praiseworthy his conduct may be when tried by any other than a legal standard.

A similar observation applies to laws "against the constitution," "opposed

<sup>a</sup> *Beaumont v. Reeve*, 8 Q. B. 483.

<sup>b</sup> *Plow.* 308.

<sup>c</sup> *Eastwood v. Kenyon*, 11 A. & E. 447, 1 Add. Con. 24.

<sup>d</sup> See as to this maxim *The Grounds and Rudiments of the Law*, 134; 1 Story Eq. Jur. § 64 e; *Sturgis v. Champneys*, 5 M. & C. 97; 1 Spence Eq. Jur. 422.

<sup>e</sup> *Post* note to § 13.

<sup>f</sup> 1 Bl. Com. 42, 43, 69; *Forbes v. Cochrane*, 2 B. & C. 471.

to the first principles of justice," "to common honesty," &c. &c. That which the supreme power in a state declares shall be law is law, and cannot be legally ignored or disobeyed; <sup>a</sup> if it can the power is not supreme. The opposite doctrine <sup>b</sup> involves a philosophical absurdity, but nevertheless, as sometimes happens, leads in practice to few bad consequences. An English judge boldly refusing to carry out a disgraceful act of parliament and to lend his assistance in crushing the liberties of his countrymen, and an American judge calmly declaring a scandalous law "void as against the fundamental principles of the constitution," would both upon an emergency have to rely upon the moral support of the people. The English doctrine, <sup>c</sup> however, is less liable to abuse than the American, and is not open to the philosophical objections so ably exposed by Bentham. <sup>d</sup>

#### NOTE TO § 12.

##### 1. Glossators.

The jurists who commented upon the *corpus juris civilis* from the time of Irnerius until that of Accursius, i.e. until the first half of the 13th century, are known by the name of Glossators. Accursius collected the most valuable parts of the writings of the commentators who preceded him, and appended the collection to the *Corpus Juris*, and in this form was that work received in Germany. Those parts therefore of the original which were unknown to the Glossators, or were passed over by them as of no practical importance, were not received in that country as law. Hence the maxim *quidquid non agnoscit glossa nec agnoscit curia*. The following parts of the *Corpus Juris* are glossed: the whole of the Institutes, the whole of the Pandects, except lib. XLVIII. tit. 20. L. 7. § 5. to L. 11.; lib. XLVIII. tit. 22. L. 10—19; many passages in the Code, and many of the Novels also are unglossed; in fact of the latter 96 only are glossed. A complete list of all the unglossed portions of the *corpus juris civilis* is given by Professor Böcking in his *Institutionen*, vol. I. p. 71, &c., in which excellent work the reader will also find an analysis of the contents of the Digest and Code, and a full examination of the system adopted in the Institutes of Gaius and Justinian.

##### 2. References to the *Corpus Juris Civilis*.

The following note upon the mode of referring to the *corpus juris civilis* may be of use to English students.

<sup>a</sup> 1 Black. Com. 91, 160, 186.

<sup>b</sup> Maintained by the Americans, 1 Kent Com. 447 &c., and see *Bonham's Ca.* 8 Co. 118 a.

<sup>c</sup> Recently recognised by Lord Campbell in *Woodward v. Watts*, 2 E. & B. 458. See too the note to § 25.

<sup>d</sup> In his *Essay on Fallacies*, Part I. c. 3.

The *Institutes* are denoted by inst. — ist. — instit. — institu. — or simply, and now most commonly, I.

The *Digest* or *Pandects* are denoted by P. — p. — π. — ff. or D. which is now most usual. Where no mention whatever is made of the part of the *corpus juris* referred to the Digest is always to be understood.

The *Code* is always denoted by C. or Cod.; and where Justinian's Code is to be distinguished from that of Theodosius, the former is denoted by C. J., the latter by C. Th.

The *Novels*, or as they were formerly called *authentice*, are denoted by auth. — aut. — authent. — N. or Nov. The last two abbreviations are now universally adopted. Sometimes the name of the Emperor who caused the Novels to be received as law is added to the abbreviations mentioned above, thus *Nov. Valentiniani*, *Nov. Leonis*; this distinguishes them from Justinian's Novels properly speaking.

The titles of the different divisions of the Corpus Juris have been referred to in different ways at different times. Formerly it was the fashion to quote the rubric only without giving the number either of the book or title; thus, *inst. de rerum divisione* — *D. de peculio* and as there happen to be three books in the Digest with the same rubric, viz. lib. XXX.—XXXII., *de legatis et fidei commissis* they were distinguished by the addition of the numbers I. II. or III.; thus, *de legatis* III. In modern times the more convenient plan of giving the number of the book and of the title either with or without the rubric is for the most part followed. Thus, *Inst. I. 2.* or *I. de jure nat.* (I. 2.). *Dig. XV. 1.* or *D. de peculio XV. 1.* or simply *de peculio* (15. 1.), which is the method adopted by the author in the present work. Where the rubric is long the first two or three words alone are given, thus, *de usuris* (22. 1.) instead of *de usuris et fructibus et causis et omnibus accessionibus et mora* (22. 1.). The last two books of the Digest are almost always referred to thus, *D. de R. J.*, (i.e. *de diversis regulis juris antiqui*) and *D. de V. S.*, (i.e. *de verborum significatione*).

The different paragraphs of each title are referred to by the letter l. or L. (short for lex). In modern times the paragraphs of the Digest are referred to by the abbreviations fr. or fragm. (short for *fragmentum*), and the paragraphs of the Code by c. or const. (short for *constitutio*). The particular paragraph referred to is denoted either by its first words or, and now almost always, by its number.

It is further necessary to denote the section of the paragraph in which the passage referred to occurs. This was formerly done by giving the first word or two of the section, thus—*inst. de rerum divisione § literæ quoque* — *D. de peculio L. si noxali judicio § quod autem* — *C. de pactis L. pacta novissima*. If there are several sections in the same law or paragraph beginning with



the same words, such sections are further distinguished by the numerals 1. 2. 3. &c., which mean that the section referred to is the 1st. 2nd. 3rd. &c. beginning with the words immediately preceding those numbers. The last section and last section but one of a paragraph or law are referred to as ult. or penult. respectively.

In modern editions of the corpus juris the different paragraphs and sections are numbered, and these numbers are used instead of the first words for the purposes of reference, thus—§ 3. I. *de rer. div.* II. 1. for inst. Lib. II. tit. 1. § 3. — fr. or L. 11. § 6. D. XV. 1. *de peculio* or L. 11. § 6. *de peculio* (15. 1.) for Digest lib. XV. tit. 1. L. 11. § 6. — c. 3. § 1. C. VI. 43. *communis de legat.* or L. 3. § 1. C. *communis de legat.* (6. 43.) for Code lib. VI. tit. 43. L. 3. § 1. If there be only one law, or fragment, or constitution in a title in the Digest or Code, this one is referred to as *lex unica* — L. un. — or c. un. — thus, c. un. C. VI. 51. *de caducis tollendis*. If in the Institutes the beginning (*principium*) of a title be referred to, there being no numbers to the first sections of the titles, the contraction pr. or princ. is used: thus, pr. I. *de nuptiis*. The *authentice* in the Code are still referred to by their first words—thus, *auth. sacramenta puberum* C. II. 28., *si adversus vend.*—as are also the constitutions of Justinian prefixed to the Digest and the Code, and which form as it were preambles to them: thus, *const. Hæc quæ necessario* at the beginning of the Code — *const. Cordi nobis*, which is the next constitution but one to that last cited.

The *Novels* are cited now by marks very different from those formerly used. The Glossators referred to the passages in this collection by placing after *authent.* the rubric of the title, then the first word or two of the chapter and lastly the *Collatio*: thus — *authent. de hered. ab intest. § si quis. Coll. IX.* Now, however, that the *Novels* are numbered throughout the much simpler plan of giving the numbers only is adopted: thus, Nov. XV. cap. 2. The first and last paragraphs are sometimes referred to as præf. (*præfatio*) and epil. (*epilogus*) respectively.

Besides the marks and abbreviations above noticed, modern writers often make use of the following: *Rubr. tit.* followed by the heading of a title when that alone is referred to: thus, *Rubr. tit. Cod. si quis aliquem testari prohibuerit vel coegerit. Totus titulus* or *toto titulo* contracted into *tot. tit.* or *t. t.*, shows that the writer refers to the whole of the title cited in support of his opinion. *Verb.* or *in verb.* (*verbis*), sometimes also *ver.* or *vers.* (*versiculo, versibus*), followed by a quotation, denotes on the other hand that the writer relies more especially on that part of the law or section in which the words quoted occur. *Ar.* or *arg.* occurring in a reference signifies that the passage referred to is relied upon, not as a direct authority, but as warranting the writer's statement by analogy.<sup>a</sup>

<sup>a</sup> Marezoll Lehrbuch der Inst. § 46. The student will find a very full account of

## NOTE TO § 13.

## 1. English Laws.

The laws of England are by no means all of home growth. Many provisions of various laws which first obtained currency in other countries have been gradually incorporated with our own statutes and customs, and form an essential and by no means inconsiderable portion of our Jurisprudence. The principal adopted laws are—

The Revealed law of God.

The Civil law of Rome.

The Canon law.

The Feudal law.

International law.

It is to be constantly borne in mind that adopted laws derive their effect *as laws* in the country into which they are imported, not from the fact of their being laws elsewhere, but from their adoption express or tacit by the supreme power of the state into which they are introduced.<sup>a</sup> The practical consequence of this is that—

1. Adopted laws have *as laws* precisely the same effect in the state adopting them as have the laws originating in that state, and neither more nor less.

2. Adopted laws are binding so far only as they have been incorporated by the adopting state.<sup>b</sup>

## 2. Adopted Law.

It has often been said that adopted law is not binding when the reason for which it was made no longer continues. But this doctrine, which arises from not distinguishing the reason of a law from its subject matter, is clearly erroneous. It is indeed true that laws cannot be applied if the circumstances to which they are applicable never exist. The Roman laws relating to certain magistrates, to concubinage and to the *legitimatio per curiæ dationem* are instances of this; such institutions being unknown in modern times the laws relating to them are of course wholly inapplicable. But the events upon the happening of which a law is to be applied may well continue to occur long after the reasons which led to the making of the law have ceased to exist. When such is the case the maxim relied upon by some writers *cessante ratione legis, cessat lex ipsa* is, as is shown by the passages cited in § 52, utterly false, or, to say the very most, can only apply to render adopted laws inapplicable

the modes which have at different times been adopted for the purpose of referring to the Corpus Juris in Thibaut's *Civilistische Abhandlungen*, p. 205 et seq.

<sup>a</sup> Austin *Prov. of Jur.* 374, 5; 1 *Bl. Com.*, 79, 80.

<sup>b</sup> 2 *Inst.* 653; *Ward v. Turner*, 2 *Ves. S.* 441; see too *per Lord Thurlow*, in *Scott v. Tyler*, 2 *Dick.* 712.

provided the reason for them has ceased *after* their adoption. *Braun*, § 13. and see *post* the note to § 52.

#### NOTE TO § 16.

#### 1. Judicial Decisions.

The propriety of considering judicial decisions as sources of law is often denied. It is argued that judicial decisions are either conformable to law or not; if the former, they are mere applications of a pre-existing rule to individual cases falling within it, and do not therefore create new laws; if the latter, they are not binding, but are themselves against law. The objection to this dilemma, however, is that it presupposes the existence of some general principle already established and applicable to every possible case. That this assumption is unfounded is proved historically by tracing the rise and gradual development of several of the best established rules of modern law, and more especially of those which obtain in courts of Equity. How long is it, for example, that the doctrines relating to a married woman's equity to a settlement, or her right to separate estate have been recognised? The truth is that the great mass of our jurisprudence is composed of what is sneeringly called judge-made law, i.e. of principles obtaining the force of law solely by being acted upon in a greater or less number of individual cases by the judicial officers of the country. A note is not the place to investigate the limits within which judges can properly exercise a legislative power, but that to a certain extent they, in all countries, have and use it, and must necessarily do so if the law is to keep pace with the ever progressing habits of society, can scarcely be denied by any one who attends to the history of jurisprudence.<sup>a</sup>

#### 2. Their relative weight.

In a country like England where the principal evidence of what is law is furnished by judicial decisions upon particular cases, it is necessary for the student to ascertain what weight is properly attributable to a decided case. The following principles are universally recognised as binding.

1. The decision of any tribunal is binding upon all tribunals over which it has an appellate jurisdiction. Hence, however much a subordinate judge may disapprove of the decision of the court to whom an appeal from him lies, he is bound to apply the principle of that decision to all cases falling within it.<sup>b</sup>

<sup>a</sup> See *Braun's Erör.* p. 25; 1 *Spence Eq. Jur. of the Court of Chancery*, p. 419; and a good article in the 19th vol. of the *Law Review*, p. 22 et seq. The judgment of Mr. Justice Park in *Mirchouse v. Rennell*, 8 Bing. 515, contains an excellent statement of the province of a judge who is called upon to decide a new case.

<sup>b</sup> See the many cases decided after *Uphill's ca.* 14 Jur. 843, and amongst others *Sichel's ca.* 1 Sim. N. S. 187.

The decision of any tribunal is not binding upon any other tribunal (unless an appeal lies from the latter to the former) if such decision being recent was professedly founded on a law which, in the opinion of that other tribunal, clearly<sup>a</sup> did not justify it.<sup>b</sup>

3. But the decision of any tribunal if followed from time to time for a long period, will not be departed from, however much it may be disapproved of by those who have subsequently to apply or neglect it.<sup>c</sup> In such a case whether the first decision was professedly founded on a statute,<sup>d</sup> or only purported to be a declaration of the common law,<sup>e</sup> is immaterial; the maxim *communis error facit jus* is applicable, and the student must console himself as best he can with the reflection—*Non omnibus quæ a majoribus constituta sunt ratio reddi potest.*<sup>f</sup>

4. An old decision which, not having been either followed by a long series of others, or expressly overruled, is at variance with all the analogies of modern law, is not considered binding.<sup>g</sup>

5. If there be several conflicting decisions the more modern are preferred to the more ancient,<sup>h</sup> and those which have received most consideration, to those which have received less.<sup>i</sup>

#### NOTE TO § 17.

##### Custom.

By the old writers on English law the word custom is used to denote a particular and not a general custom.<sup>j</sup>

For the circumstances which must concur to make a valid custom see generally 1 Black. Com. 74, &c.; Com. Dig. *Copyhold S.*; Coke's Law Tracts, p. 59, &c.; Vin. Ab. *Custom*.

The leading case upon the subject is *Le Case de Tanistry*,<sup>k</sup> where the Irish

<sup>a</sup> *Payle v. Bird*, 6 B. & C. 531.

<sup>b</sup> *Doswell v. Impey*, 1 B. & C. 169; *Watts v. Rees*, 9 Ex. 696; *Tetley v. Taylor*, 1 E. & B. 531; *R. v. Shrewsbury*, 1 E. & B. 711; *West v. Ray, Kay*, 385; but in matters of practice see *Montagu v. Smith*, 16, Jur. 40.

<sup>c</sup> *Slade's ca.*, 4 Co. 93 b; 16 Vin. Ab. 502, pl. 15 & (C); 2 P. Wms. 452; *Doe v. Manning*, 9 East, 59; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829, per Patteson, J. See too the note to *Dumport's ca.*, in 1 Smith, L. C. 18, and *Edwards v. The Queen*, 9 Ex. 628. This doctrine extends even to the interpretation of private instruments, 1. M. & K. 59; *Kay*, 375.

<sup>d</sup> As in *Gooch's ca.*, 6 Co. 60 b; and see *R. v. Bewdley*, 1 P. Wms. 207.

<sup>e</sup> As in *Dumport's ca.*, 4. Co. 119 b.

<sup>f</sup> Dig. I., tit. 3, l. 20.

<sup>g</sup> *Putland v. Newman*, 6 M. & S. 179.

<sup>h</sup> *Magnay v. Edwards*, 13 C. B. 479; *Meredith v. Meigh*, 2 E. & B. 364; *McDonald v. Bryce*, 16 Beav. 581; *Reedie v. N. W. Rail. Co.*, 4 Ex. 244; *Marshall v. Collett*, 1 Y. & C. 239; see the views of the judges expressed in *Watts v. Rees*, 9 Ex. 696.

<sup>i</sup> 4 Co. 94 a. See per Pollock, C. B., 9 Ex. 699.

<sup>j</sup> Lit. § 169; Finch's Law, 55; Co. Lit. 110 b, 115 b.

<sup>k</sup> Davis, 29.

judges held an ancient general Irish usage void, as being unreasonable and uncertain. The student will find in the judgment not only a clear statement of the old law, but also, what is not very common in reports of that date, a sensible examination of the doctrines discussed.

#### NOTE TO § 18.

One act may be sufficient evidence of a custom, *Roe v. Jeffery*, 2 M. & S. 92.

#### NOTE TO § 19.

### 1. Nature of a Custom.

All customs, be they general or particular, are in the early stages of their growth nothing more than positive moral rules,<sup>a</sup> and it is by no means easy to determine when this condition ceases and when a custom may be said to be law. Thibaut, both in the text and in his lectures (see *Froben* § 19, and *Braun* § 20), states as his opinion that no special act of the supreme power or of its judges is requisite to convert the moral rule into a binding law, although in case of a disputed custom the first duty of the judge is to see whether it has been already established by a judicial decision and is become *res judicata*. Mr. Austin,<sup>b</sup> on the other hand, contends that, until confirmed by judicial authority, a custom remains a mere moral rule with opinion for its sanction. If this be so that which is a positive moral rule is declared, by the first judgment in its favour, not only to be binding as a law for the future, but to have been binding as law from a time anterior to the decision: the judge in fact attributing to the breach of that which *ex hypothesi* was a mere moral rule the consequences of a breach of an existing law. It would seem therefore better and more consonant to the principles regulating the judicial office to hold, with Thibaut and many other writers of equal celebrity, that a positive moral rule becomes binding as law by virtue of the tacit general assent of the supreme power, whenever the rule is evidenced by an unbroken series of similar acts or forbearances inexplicable except upon the supposition that they have been purposely done or omitted from a common feeling of necessity.<sup>c</sup>

Those writers who maintain that a custom is binding *as law* independently of the assent, even general and tacit, of the supreme power, are well answered by Mr. Austin. A rule which is binding must surely be so by the assent, tacit or declared, of the power which can at any time abolish it.<sup>d</sup>

<sup>a</sup> Davis, 32. The statement of L. C. J. Wilmut, in *Collins v. Blantarn*, 2 Wils. 341, that "the common law is nothing else but statute worn out by time," cannot be considered correct.

<sup>b</sup> *Prov. of Jurisp.* 27 &c., and *appx.* p. X. & XI.

<sup>c</sup> See Davis Rep. 32.

<sup>d</sup> See too Hobbes' *Leviathan*, Pt. II. c. 26, § 5.

## 2. Custom and written Law.

The question whether written law can be repealed in whole or in part by custom has given rise to much difference of opinion amongst Roman jurists.

The texts relating to this subject are the following—

*Inst. I. tit. 2, de jure natur. §c. § 11.* Ea (jura) vero, quæ, ipsa sibi quæque civitas constituit, sæpe mutari solent vel tacito consensu populi, vel alia postea lege nata.

*2. Dig. I. tit. 3, de leg. §c. l. 35.* Sed et ea quæ longa consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio non minus quam ea, quæ scripta sunt jura, servantur.

*3. Dig. I. tit. 3, de leg. l. 32. § 1.* Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium par desuetudinem abrogentur.

*4. Cod. VIII. tit. 53, quæ sit, §c. l. 2.* Consuetudinis ususque longævi non villis auctoritas est, sed non usque adeo sui valitura momento ut rationem vincat aut legem.

The difficulty arises from the last passage, and especially as to the true meaning of the words *rationem* and *legem*. The better opinion, and that held by Puchta and Savigny,<sup>a</sup> seems to be that a general law can repeal a general or particular custom; that general custom can repeal a general or particular law; that a particular law can repeal a particular but not a general custom; and that a particular custom can repeal a particular but not a general law. Savigny, commenting on the above passage in the Code, is of opinion that it applies only to particular and not to general customs, that the word *lex* means a general law and that the word *ratio* means not a *ratio juris* nor abstract reason, but the *ratio publicæ utilitatis*. The import of the passage he takes to be this: Particular customs are invalid if opposed to the general interest of the state, whether such general interest be declared in a general law or not.

By the writers on English law it is usually laid down that no custom can take away the force of an act of Parliament.<sup>b</sup> However, as before observed, custom in English law books means, unless otherwise expressed, particular custom (see note to § 17), and there are several instances on record of general customs having arisen and been judicially recognised, notwithstanding acts of Parliament to the contrary. The most remarkable case of this kind is afforded by the history of entails, which were as a matter of course allowed to be barred in the very teeth of the statute *de donis* long before the reign of Hen. VII. when the practice received legislative sanction.<sup>c</sup> Many other

<sup>a</sup> 1 Puchta *Inst.* 48; 1 Puchta *Vorles.* 30, 42. 1 Sav. *System*, 151, & Beil. 2, p. 400.

<sup>b</sup> Co. Lit. 113 a, 115 a; 1 Bl. Com. 186.

<sup>c</sup> See Cruise on Recoveries, chap. 1.

statutes, general as well as special, have become obsolete,<sup>a</sup> and we have before (note 2 nr. 3 to § 16) seen the effect which judicial decisions may have upon them.

NOTE TO § 20.

**Proof of Customs.**

The question whether judicial notice should be taken of any, and if of any of what customs is important and still open. The Roman law is silent upon the subject.

According to some writers every custom relied on by a litigating party requires, like any other *fact* relied on by him, to be proved. This opinion is based upon two errors, viz., 1, a want of accurate discrimination between law and fact; 2, an erroneous view of the true nature of a custom which is a law made known by facts and not a mere series of facts. The facts by which a legal custom is made known bear very much the same relation to that custom as the fact of promulgation bears to a written law, and the reason which requires judicial notice to be taken of this latter fact also requires such notice to be taken of the former facts.

The only other opinion, and that almost universally entertained, is that judicial notice must be taken of all general customs, and that all particular ones must be proved by the party relying upon their existence. For this opinion the following reasons may be given: the laws written and unwritten of most countries are numerous and intricate and of every degree of importance; those of general importance and application must be learned by every judge in order that he may be able to act at all as such; and of these it is essential for the transaction of business that he should take judicial notice. The laws of less importance, whether written or unwritten, those which are applicable to a few individuals only and which are binding only in certain places, he cannot be expected to be so well acquainted with; and it is for this reason of necessity that the line is drawn between general and particular laws, written or unwritten. Judicial notice is required to be taken of general laws but not of particular laws, the existence of which must therefore be proved.

The last proposition must however be taken with this qualification. Where a court has a special jurisdiction over a certain class of persons or over a certain district, any custom generally binding over those persons or in that district, though particular with regard to the whole state to which such persons may belong or in which such tract of land is situate, is, with regard to that court, a general custom, and must be therein judicially noticed as such.<sup>b</sup>

<sup>a</sup> 436 "Public General Acts" are said to be obsolete. Statute Law Commission, first Rep. 110, and see p. 121.

<sup>b</sup> See upon this subject, 1 Savigny System, § 30; 1 Vangerow *Leitfaden*, § 17;

As the only mode of ascertaining the existence of a custom not already recognised by the courts, is to prove facts from which it may be inferred, the question of custom or no custom is for the jury and not the judge.<sup>a</sup>

## NOTE TO § 22.

**Majority.**

As regards corporations it is clear that the will of the majority is the will of the corporation, and binds the minority in all matters consonant to and not in contravention of the purposes for which the corporation exists.<sup>b</sup>

In ordinary partnerships a similar doctrine obtains; but of course a majority have no power to bind the minority except as regards matters within the scope of the partnership business.<sup>c</sup>

## NOTE TO § 24.

**1. Permissive Laws.**

No law can be permissive in the sense that every body is at liberty to obey it or not as he likes; but a law may not improperly be called permissive which enables one person to do or forbear at his pleasure. Such a law, permissive as to him, is compulsory on every one else and obliges all persons to forbear obstructing him in the exercise of the right conferred upon him.

As to what statutes are not permissive even in this sense, although the words are not mandatory, see Com. Dig. *Parliament*, R. 22.; 1 Ell. & Bl. 178, 228, 253; 2 Ell. & Bl. 210, where the student will find cases in which *may* has been construed *must*.

**2. Distributive Justice.**

Those who desire further information respecting the unintelligible division of justice into commutative and distributive, are referred to Aristotle's Ethics, Book V. c. 3, 4.; Vinnius Comm. I. tit. 1.; Voet. Comm. I. tit. I. § 9.; Grot. de Jure B. ac P. I. 1, § 8.

## NOTE TO § 25.

**Time from which Laws bind.**

Previous to the passing of the 33 Geo. III. c. 13, it was the settled

1 Mühlenbruch Lehrbuch d. Pand. Rechts § 39 & notes: Voet. Com. ad Pand. I. tit. 3 § 32 *et seq.* Co. Lit. 89 a, n. 7, 110 b; Com. Dig. *Copyh.* (S. 1.); 2 Burr. 1226, 1228. 1 Fonb. Eq. 250.

<sup>a</sup> Black. Com. 76.

<sup>b</sup> See Grant on Corporations, p. 68, &c.

<sup>c</sup> Story on Partnership, § 123; *Ex parte Morgan*, 1 Mac. & G. 235, 240.



rule in this country that, unless some day were specially named, every act of parliament took effect from a time even anterior to its passing, namely, from the first day of the session in which it passed.<sup>a</sup> This rule, opposed as it is to "all the first principles of justice and common honesty" as well as to the established maxim *in fictione legis semper subsistit æquitas*, is a remarkable illustration of the doctrine (noticed in the note to § 11), that the binding power of a clearly established law is wholly irrespective of its conformity with moral notions of right and wrong. By the above statute the rule is altered, and acts of Parliament now take effect from the day upon which they receive the Royal assent unless some other time is specially fixed.

## NOTE TO § 26.

**Retrospective Laws.**

For cases illustrating the maxim *Nova constitutio futuris formam imponere debet, non præteritis*, see Broom's Maxims, 28; *Doolbuss v. Ramtoll*, 15 Jur. 257; *Pinhorn v. Souster*, 8 Ex. 763, and 16 Jur. 1001; *Moore v. Darden*, 12 Jur. 138.

With respect to pending proceedings, it is held that an action, &c., founded on a law repealed before the action, &c. is wholly at an end, cannot be continued, *Surtees v. Ellison*, 9 B. & C. 750; *R. v. Inhabitants of Denton*, 17 Jur. 453.

## NOTE TO § 27.

**Whom Laws bind.**

Foreigners, whilst in this country, are clearly bound by our laws,<sup>b</sup> which also extend to companies established and directed here for the purpose of carrying on business abroad.<sup>c</sup> But a foreign sovereign, although residing here, is not amenable to our laws unless he be a subject of the English crown, and unless the rights sought to be enforced against him have arisen from a transaction engaged in by him as such subject.<sup>d</sup>

## NOTE TO § 28.

**Laws binding the Crown.**

Notwithstanding the inviolability of the person of the sovereign, the doctrine that the crown is subject to the laws of the land is at least as old as Bracton; *ipse autem rex non debet esse sub homine, sed sub Deo et sub lege*,

<sup>a</sup> Plow. 79; Com. Dig. Parlt. (R. 1.); *R. v. Thurston*, 1 Lev. 91; *A. G. v. Panter*, 6 Bro. P. C. 553; *Latless v. Holmes*, 4 T. R. 660.

<sup>b</sup> See 9 Hare, 425, *Caldwell v. Vanclissen*.

<sup>c</sup> *Ex parte Turner in re The Madrid and Valencia Railway Com.*, 3 De G. & Sm. 127.

<sup>d</sup> *Duke of Brunswick v. King of Hanover*, 6 Beav. 1.

*quia lex facit regem.*<sup>a</sup> It is not, however, every statute which affects the crown. Unless specially named, the sovereign is not bound by an act of Parliament,<sup>b</sup> if it be not one which is made for the public good,<sup>c</sup> or that “suppresseth wrong and advanceth right.”<sup>d</sup>

## NOTE TO § 29.

**Ignorance and Mistake.**

## 1.

With respect to ignorance and mistake, the following *general principles* were, prior to the appearance of Savigny’s celebrated essay, recognised by most jurists.

1. Ignorance of matters of law prejudices, whilst ignorance of matters of fact does not prejudice the ignorant party.

2. A difference must be taken between *lucrum* and *damnum*, and in a case of *damnum* between *res amissa* and *res amittenda*, inasmuch as it is only in *damno rei amittendæ* that a person is allowed to avail himself of his ignorance of matters of law.

3. *Non videntur qui errant consentire.*

Combining these three principles, an artificial and highly arbitrary set of doctrines was elaborated and applied by continental writers on jurisprudence to cases involving questions of ignorance. *Finnius*, who may be taken as a fair example of the older class of jurists, thus sums up the matter in his *Aditus ad Jurisprudentiam*, c. 5.

“Ignorance is two-fold; of fact, or of law. Ignorance of fact is where the circumstances from which the law arises are unknown. Ignorance of law is where, the circumstances being known, the law applicable to them is unknown. Ignorance of fact, unless gross, does not prejudice, whether in seeking to avoid a loss or to make an acquisition. Ignorance of law aids no one. But here there is a difference. In criminal matters such ignorance is of no avail in mitigation of a penalty, unless it be in the case of persons of unsound mind and of children under twelve years of age. But if an act be done in ignorance of laws purely civil (for the reason does not apply to laws of nature, which being implanted in the breast of every one, ignorance of them is inexcusable), such ignorance protects those other persons to whom ignorance of law is permitted, viz., women and minors. In matters of contract, again, ignorance of law cannot benefit a person (not a minor or

<sup>a</sup> Bracton, 5 b.

<sup>b</sup> Plow. 239 b.

<sup>c</sup> Plow. 236 a.

<sup>d</sup> 2 Inst. 359; 5 Co. 14 b; 11 Co. 72 a; and see generally Com. Dig. *Parlt.* (R. 8.) Bac. Ab. *Prerog.* (E. 5.) and *Baron de Bode v. The Queen* in error, 14 Jur. 970.

soldier) who seeks to make an acquisition. If, however, a loss is sought to be avoided, then a distinction must be taken between a loss already incurred, and a loss not yet sustained. If the loss sought to be avoided be of the former kind, ignorance of law cannot be vouched in aid, except by minors, soldiers, women, and rustics; whilst, if the loss be of the latter description, such ignorance is never damnable."<sup>a</sup>

Savigny however in an essay, remarkable alike for its philosophic views and profound learning, has placed the principles applicable to this subject upon an entirely different basis. It would be impossible in a note to give even a short statement of the principles which he has developed and of their application to the various passages relating to ignorance and mistake found scattered through the *Corpus juris civilis*. Those who are desirous to acquire such information must refer to the essay itself, which forms an appendix to the third volume of his *System*. At the same time the principles themselves are of such general importance that they, without the qualifications which must be made in applying them, are subjoined for the benefit of such persons who may not have access to the original work.

Ignorance (including mistake) has not, as such, any effect upon the legal consequences of an act or transaction in which it occurs. The effect generally attributed to ignorance is properly attributable to the negligence which is the cause of it. Ignorance which is not the effect of gross negligence is not prejudicial to the ignorant party, but ignorance which is the effect of such negligence is prejudicial to him. Whether ignorance be or be not the result of gross negligence depends upon circumstances; it is presumed to be so when a person is ignorant of the general laws of his country or of his own affairs, but it is not so presumed when he is ignorant of other matters. The presumption which arises in each of these cases is rebuttable, but is conclusive if not rebutted by the person against whom it arises.

Ignorance of matters of law and ignorance of matters of fact are thus placed upon the same footing: both are prejudicial when the result of gross negligence; both are harmless when not so. There is no distinction between *lucrum*, *damnum*, *res amissa*, and *res amittenda*. In a great number of cases, whether the result of a transaction is to be considered as gain or loss, depends very much upon the time to which reference is made. The maxim *non consentit qui errat*, moreover, has no application when the ignorant party does actually express what he means under the circumstances as known to him, though it becomes of the highest importance when a person's intention is not expressed but is to be collected from his conduct. With respect to the important question whether money which has been paid by mistake in matter of law can be recovered by the *condictio indebiti*, Savigny expresses a decided

<sup>a</sup> See too Voet. Com. ad Pand. XXII., tit. 6.

opinion in the negative, subject to qualification, however, in case such ignorance can be proved not to have been the result of gross negligence. This is precisely equivalent to the statement in the text, which is also supported by most writers on jurisprudence, though disapproved of by Vinnius, Mühlenbruch, and others.

## 2.

In the text no notice is taken of ignorance of customary law, nor was such notice necessary; for ignorance of customary law resolves itself into ignorance either of the law resulting from certain known facts or of the facts from which the law itself is deduced. In the former case the principles stated under division I. of section 29, in the latter those stated under division II. are applicable.

## 3.

For the English law upon mistake and the application of the maxims *Ignorantia facti excusat*—*Ignorantia juris non excusat*, see Broom's Maxims, 190; the Law Magazine for 1842, p. 90; Viner's Abridgment, Notice A.; Story, Eq. Jur. c. 5.; Evans' Pothier on Obligations.

The main doctrines to be borne in mind by the student are as follows:

I. Every person is bound to be acquainted with, and is consequently to be treated as if he knew, the laws to which he is subject.<sup>a</sup> Hence—

A. In matters criminal, not even a foreigner can avoid the consequences of his own act done here, although by the laws of his own country it be no crime.<sup>b</sup>

B. In matters civil, ignorance of law is no ground upon which a person can defend himself from the action or suit of another,<sup>c</sup> or can himself take active steps to avoid the effect of his own acts.<sup>d</sup> But this, both at law<sup>e</sup> and in equity,<sup>f</sup> is upon the supposition that the mistake was not induced by the person insisting on its immateriality.

II. Ignorance of fact is not attended with the same consequences; for

A. In matters criminal, a mistake of this kind may afford a perfectly good defence;<sup>g</sup> and—

B. In matters civil—

a. In which knowledge or intention is important, not only can a person allege his own ignorance or mistake as a defence to an action or suit insti-

<sup>a</sup> Plow. 184, 342, 3; Doct. and Stud. Dia. II. c. 46.

<sup>b</sup> *R. v. Esop*, 7 C. & P. 456, and see *Barronet's ca.*, 1 E. & B. 1.

<sup>c</sup> *Stephens v. Lynch*, 12 East, 38; 1 Story Eq. Jur. § 111. &c.

<sup>d</sup> *Billie v. Lumley*, 2 East, 469; *Kelly v. Solari*, 9 M. & W. 54; 1 Story E. J. § 112;

1 Vern. 119; but see as to compromises *Lawton v. Champion*, 18 Jur. 818.

<sup>e</sup> *Southall v. Rigg*, 15 Jur. 707, C. P.

<sup>f</sup> 1 Story Eq. J. § 131.

<sup>g</sup> *Levett's ca.*, cited Cro. Car. 538.

tuted against him,<sup>a</sup> but he may also, upon the ground of mistake, actively obtain relief in order to avoid its consequences.<sup>b</sup> However, if the mistake is of a fact which the person is bound to know or inquire into, or is owing to his own negligence, equity will not assist him;<sup>c</sup> but it is said that, at law this latter circumstance is immaterial.<sup>d</sup>

b. In which knowledge and intention are unimportant (as in cases of trespass, &c.), a mistake on the part of the wrong-doer is no defence to an action founded on the tort; but it may be important in estimating the damages to be paid.<sup>e</sup>

The reader must however bear in mind that it is not every mistake which is attended by the above consequences; there are many cases in which a mistake of fact is no ground of defence and still less for relief;<sup>f</sup> much depends upon the nature of the transaction, and much on what has been mistaken, and it is extremely difficult, if not impossible, accurately to state as a general proposition what mistakes are and what are not material.

#### NOTE TO § 31.

##### Privilegia.

The Roman lawyers denoted whatever had a restricted effect, and consequently whatever was confined to a particular person, by the expression *in personam*, whilst they denoted whatever had a general effect, whether relating to things or persons, by the expression *in rem* (*post*, note to § 62 (4 A)).

*Privilegia* are consequently *in personam*, if they are limited to some individual, and do not extend to others who may stand in his place.

*Privilegia in rem* (in modern times also called *realia*) are those which extend to persons who may stand in the place of him first privileged. To this class belong those—

1. Annexed to a thing, whether—

a. Corporeal (*privilegia prædia concessa*), as if a place is exempted from a tax; or

<sup>a</sup> *Mason v. Armitage*, 13 Ves. 25; Doct. and Stud. Dia. II. c. 46; and see the cases in equity on the subject of notice, and especially *Jones v. Smith*, 1 Hare, 43.

<sup>b</sup> *Brisbane v. Dacres*, 5 Taunt. 143; *Wilkinson v. Johnson*, 3 B. & C. 428; 1 Story E. J. 152, &c.; *Tollet v. Tollet*, 1 Wh. & Tud. L. C. 155.

<sup>c</sup> *Wason v. Warcing*, 15 Beav. 151.

<sup>d</sup> *Bell v. Gardiner*, 4 Man. & Gr. 11; *Kelly v. Solari*, 9 M. & W. 54; but see *per Bayley, J.*, 6 B. & C. 677.

<sup>e</sup> Inferred from decisions in cases where the trespass complained of was unintentional, e.g. *Leame v. Bray*, 3 East, 593. In Com. Dig. Chancery (D. 5) it is even said, on the authority of Hardres, that a person arrested by mistake induced by his personating another may bring an action for the false imprisonment!

<sup>f</sup> See *Richardson v. Peyton*, 2 Do G. M. & G. 79; *Okill v. Whitaker*, 1 Do G. & Sm. 83, & 2 Ph. 338; *Belworth v. Hassell*, 4 Camp. 140; 17 Beav. 282.

b. Incorporeal, i.e. annexed to some other right (*privilegia causæ concessa*), as those annexed to rights of mortgage.

2. Which extend to the sureties of the privileged person; and those

3. Which extend to his heirs.

With respect to privileges annexed to things, it is to be observed that what is meant, is, that the acquisition of the thing confers upon the acquirer, whoever he may be, the right of taking advantage of the privilege. It is not meant that the thing has any right conferred upon it, and yet, by not attending to this very obvious remark, Alef, as stated in the text,<sup>a</sup> has been induced to deny the possibility of real privileges, and to contend that they must all be personal.<sup>b</sup>

#### NOTES TO §§ 31—33.

Akin to the *Privilegia* of the Romans are our charters, patents, and private statutes. Private acts of Parliament<sup>c</sup> are governed by very different rules from public statutes; for the former not only do not affect the rights of strangers, even in the absence of the usual saving clause,<sup>d</sup> but will actually be relieved against by courts of justice if obtained by undue means.<sup>e</sup>

#### NOTE TO § 34.

##### **Jus commune.**

The student must not confound the division of *jus* into *commune* and *singulare* with the division of *leges* into *generales* and *speciales*. The latter is a division of laws with reference to their extent; the former is a division of law with reference to its character, and moreover is, properly speaking, confined to *jus*, composed of *leges generales*. So that we have<sup>f</sup>

I. *Leges generales*, obliging generally to acts or forbearances of a class, and divisible into two sections according to the character of the laws themselves, viz. into

1. *Jus commune*, not anomalous or opposed to reason or general utility.

2. *Jus singulare*, of an anomalous nature, *quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.*<sup>g</sup> *Jus singulare* is sometimes called *jus exorbitans*, and sometimes *privilegium*.

II. *Leyes speciales*, confined in their application to some particular case,

<sup>a</sup> § 31 n. c.

<sup>b</sup> Froben, § 31.

<sup>c</sup> As to which see in general 5 Cruise, Digest, tit. XXXIII.

<sup>d</sup> Plow. 231; 8 Co. 138 a; *Lucy v. Livingston*, 1 Vent. 176.

<sup>e</sup> 2 Bl. Com. 346; Cru. Dig. *ubi sup.* § 49: Com. Dig. *Patent* (F. 2). As to charters see *R. v. The Eastern Archipelago Company*, 1 Ell. & B. 310 & 2 id. 856.

<sup>f</sup> Compare the text § 30 & 34, & 2 Thib. Vers. 237.

<sup>g</sup> Dig. I. tit. 3 de leg. L. 15.



"Personal statutes are said to be those laws which principally affect a man's person and capacity; although indirectly they may also relate to property.

"Real statutes are said to be those laws which principally relate to things (and especially such as are immoveable), although indirectly they may also affect the person.

"Mixed statutes are said by some writers to be those laws which have not for their subject-matter either person or thing, but rather events (transactions); but, according to other writers, mixed statutes are those laws which at once relate both to person and thing. These two meanings are obviously very different, and yet they run into each other.

"The practical application of these distinctions is as follows. The question arises in a given case What is the country on whose laws the decision must depend? The answer is as follows. The personal statutes current in the place of a person's domicile are to be applied to him even by the judges of other countries. The real statutes current in the place where immoveable property is situate, are to be applied to all questions concerning it, whether, as before, such questions have to be decided by home or foreign judges. The mixed statutes current in the place where a transaction occurs, are also to be applied without any distinction being taken as to the state to which the deciding judge belongs. Such is the general answer. But in the application of those broad rules to individual cases, many differences of opinion arise, inasmuch as writers do not agree upon the precise limits of the terms used, and consequently sometimes extend or restrict them in one direction, and sometimes in another."

## 2.

The general principles usually recognised in modern times, and acted upon by the English courts, are—

### I. In matters civil—

1. As regards real property; the laws of the place where it is situate govern its transfer and all transactions operating immediately upon it.<sup>a</sup>

2. As regards personal property; the *lex domicilii* governs its disposition upon the death of its owner, testate or intestate:<sup>b</sup> and the law of the place where a transaction is entered into determines its validity or invalidity and the rights and duties arising from it.<sup>c</sup> *Lex loci regit actum*.

3. As regards the remedies open to a person seeking to enforce his rights,

<sup>a</sup> Story's Conflict, c. 10; per Sir Wm. Grant, 14 Ves. 541; *Doe v. Vardill*, 5 B. & C. 438.

<sup>b</sup> Story's Conflict, c. 11 & 12; 1 Wms. Exors. 305, 6 and 2 *ib.* 1301.

<sup>c</sup> See Braun and Froben on this §; Story's Conf. § 242; and the late cases of *Boosey v. Jefferys*, 15 Jur. 540; *Gibbs v. Fremont*, 9 Ex. 25.



and as regards the method of procedure in such a case, the law of the place in which the court, whose assistance he asks, is situate can alone be observed.<sup>a</sup> *Lex fori regit remedium.*

II. In matters criminal; no man is, in the absence of an express law, punishable in one country for the acts done by him in another, nor is he in one country affected by the consequences which in another may attach to his condemnation there.<sup>b</sup>

Upon grounds not applicable to transactions in general it is settled that a marriage, valid by the law of the place where it is celebrated, is valid in the country to which the parties belong, although they may have intermarried abroad solely with a view to evade the laws of their own country.<sup>c</sup>

The revenue laws of a foreign country are not taken into account by English courts, except in cases where the non-observance of such laws renders a transaction wholly invalid.<sup>d</sup>

#### NOTE TO § 39.

##### Repeal of Laws.

See *ante* note 2 to § 13 and *post* note to § 52 for observations on the maxim *cessante ratione cessat lex ipsa*.

A law is neither more nor less easily repealed by providing that it shall never be so. Com. Dig. *Parlt.* (K.)

#### NOTE TO § 41.

##### Repeal of Statutes.

As to the repeal of statutes see 1 Black. Com. 89; Broom's Maxims, 23; Com. Dig. *Parlt.* (R. 9. a.); Vin. Ab. *Statutes* (E. 6. pl. 84, &c.)

It may be useful to observe that the maxim *species generi derogat* is recognised by the laws of England, and that consequently a particular law, be it statutory or customary, is not, in the absence of a clear intention to the contrary, repealed by a law which is general:<sup>e</sup> and a statute may be particular within this rule, although declared by the legislature to be public.<sup>f</sup>

<sup>a</sup> See Braun and Froben on this §; Story's Conf. c. 14; *Leroux v. Brown*, 12 C. B. 801.

<sup>b</sup> See Story's Conf. c. 16; 3 E. & B. 124.

<sup>c</sup> Story's Conf. § 123 *et seq.* and § 113 *et seq.* where the necessary limitations in cases of polygamy, incest, &c. will be found.

<sup>d</sup> *Holman v. Johnson*, Cowp. 343; *Bristowe v. Sequeville*, 5 Ex. 275.

<sup>e</sup> Co. Lit. 115 a; Vin. Ab. *Stat.* (E. 6. pl. 68); Com. Dig. *Copyhold* (S. 5); Plow. 113; *Gregory's case*, 6 Co. 19 b; 8 Co. 118 b, 119 a; *Salter's Co. v. Jay*, 3 Q. B. 109; *Shepherd v. Hodman*, 16 Jur. 948, Q. B.; *Birkenhead Dock Co.'s case*, 18 Jur. 883; Jenk. Cent. 123, ca. 41.

<sup>f</sup> See the judgment of L. J. Turner, in the *Birkenhead Dock Co.'s case*, 18 Jur. 883.

## NOTE TO § 46.

**Construction of Statutes.**

The ordinary rules applicable to the construction of statutes will be found collected in 1 Bl. Com. 87; Com. Dig. *Parlt.* (R. 10.); Vin. Ab. *Statutes* (E. 6.); Dwaris on Statutes; Broom's Maxims, c. 8.

The leading principles to be observed are as follows—

1. The intention of the legislature is to be gathered from the words used, which, unless some reason to the contrary can be shown clearly to exist, are to be taken in their ordinary acceptation, and to be construed according to the usual rules of grammar.<sup>a</sup>

2. If the above rule, when applied, leads to no absurdity, inconsistency, or unintelligible result, effect must be given to the words used, and to them only, however hard the consequence,<sup>b</sup> or however clear it may be that the legislature overlooked some particular case which may have arisen.<sup>c</sup>

3. But if the above rule, when applied, leads to an absurdity, inconsistency, or unintelligible result, then that construction must be adopted which, avoiding all such consequences, is most in compliance with the rule.<sup>d</sup>

## NOTE TO § 49.

That the words of a statute are to be taken in what was their ordinary acceptation when the act passed, see Com. Dig. *Parols* (A) and the cases referred to below (note a).

An exception to this rule, however, arises when a word having a wide signification is used in company with other words of less extensive import, and which are in fact included in the general term. In such a case the general word has a less extensive meaning than it would have if standing alone, and is deemed to extend only to such matters or things as, being

<sup>a</sup> See *R. v. Ramsgate*, 6 B. & C. 712; *R. v. Grt. Bentley*, 10 B. & C. 526; *R. v. Bird*, 15 Jur. 195, per Martin, B; *Miller v. Salomons*, 7 Ex. 475; *Coe v. Lawrance*, 1 E. & B. 516; *R. v. Knapp*, 2 E. & B. 447; *East. Un. Railway v. Cochrane*, 9 Ex. 197; *Arnold v. Ridge*, 13 C. B. 763; 3 E. & B. 749, 750; 3 De G. M. & G. 606; 15 Ves. 406.

<sup>b</sup> *Eastern Union Railway v. Cochrane*, 9 Ex. 197.

<sup>c</sup> *Coe v. Lawrance*, 1 E. & B. 516; *Woodward v. Watts*, 2 Ell. & B. 452; *Myers v. Perigal*, 2 De G. M. & G. 604; *Davison v. Farmer*, 6 Ex. 242; *Pocock v. Pickering*, 16 Jur. 761, per Coleridge, J.; *Abley v. Dale*, 11 C. B. 391; *Castique v. Page*, 13 C. B. 458, where there was something very like an inconsistency: 3 E. & B. 544. In *Mattison v. Hart*, 14 C. B. 357, the statute contained inconsistent sections, see p. 389.

<sup>d</sup> See Mr. J. Burton's judgment in *Warburton v. Loveland*, 1 Hud. & Br. Ir. Rep. 648, which has often been cited with approbation and acted on, see *Becke v. Smith*, 2 M. & W. 191; *Miller v. Salomons*, 7 Ex. 475; *R. v. Bird*, 15 Jur. 193; 14 C. B. 385

denoted by it, are of the same kind as those denoted by the other words.<sup>a</sup> *Noscitur a sociis.*

Technical words must be taken in their technical sense.<sup>b</sup>

#### NOTE TO § 52.

##### Restrictive Interpretation.

The rule referred to in § 51 for the logical extension of a law *ob identitatem rationis* is usually expressed thus: *ubi eadem legis ratio, ibi eadem dispositio*: and as there is, even to jurists, something seductive in a nicely sounding phrase, they have been induced to say contrariwise: *cessante ratione legis, cessat lex ipsa*. Against this maxim, when applied for the purpose of rendering a law inoperative, it is necessary however to protest. Two cases have to be considered—

1. The *ratio* of an old law has ceased in consequence of a change in the habits of the people. The law nevertheless remains binding until it is repealed by the lawgiving power; for as a positive law is binding, not in consequence of its adaptation to circumstances, but by virtue of its sanction, so it does not lose its force until that sanction ceases. Besides, it is often in the highest degree desirable not to disturb existing relations, and, juridically speaking, a rule frequently derives much more importance, both to sovereign and subject, from the length of its standing than from its conformity to reason.

2. The *ratio* of a law may happen not to apply to some individual case falling within its words; or, expressed otherwise, the law would not have been made if such cases had alone to be provided for. Here again the law must be held to apply; for the Romans adopted the very sensible rule *jura generaliter constituuntur*, and consequently, in order to insure certainty and consistency in their decisions, applied the law even to cases to meet which alone it would not have been made.<sup>c</sup> Froben, § 52, and see *ante* note 2 to § 13, and Fearn's observations to a similar effect in his *Essay on Contingent Remainders*, pp. 87, 88.

For instances where the maxim *cessante ratione*, &c., is applicable see Broom's *Maxims*, 118.

#### NOTE TO § 56.

##### Unilateral, Bilateral.

Unilateral, are those instruments which express the intention of one person or set of persons, e.g. deeds poll, promissory notes, disclaimers, wills, &c.

<sup>a</sup> Broom's *Max.*, 450; *R. v. Whitnash*, 7 B. & C. 596; *Blandford v. Morrison*, 15 Q. B. 724; 1 Bl. Com. 88.

<sup>b</sup> 1 Bl. Com. 60.

<sup>c</sup> See the passages cited in note (7) to § 52.

Bilateral are those which express the concurrent intention of more than one person or set of persons, e.g. indentures, agreements, treaties, &c.

The word reciprocal or synallagmatic is sometimes used instead of bilateral.<sup>a</sup>

NOTE TO § 55.

**Construction of other Instruments.**

The rules applicable to the interpretation of deeds, wills, and contracts, are so fully stated in well known works, e.g. Sheppard's Touchstone, c. 5 & 23; Jarman on Wills; Roper on Legacies; 2 Addison Contr. c. 19; Chitty on Contracts, and Wigram's essay on the admission of extrinsic evidence in aid of the interpretation of wills, that it is wholly unnecessary to illustrate those rules by the citation of cases here. The following observations, however, may not be out of place—

1. Rules of construction, being merely aids whereby to ascertain the intention of the utterer from the expressions he has used, are the same in courts of Law as in courts of Equity,<sup>b</sup> and in contracts under seal as in those not under seal.<sup>c</sup>

2. Similar expressions, however, may, even in the same instrument, have very different effects according as real or personal property is referred to.<sup>d</sup>

3. The construction of a document is for the judge and not for the jury, although the latter may, as in cases of libel, have to determine *quo animo* it was written and also the particular meaning borne by any technical expressions which may occur in it.<sup>e</sup>

4. Parol evidence is not admissible to show that what a person has in writing declared to be his meaning was not so in point of fact.<sup>f</sup>

5. But parol evidence is admissible to show—

a. That the words employed were used, not in their ordinary meaning, but in some *customary* sense.<sup>g</sup>

b. The circumstances present to the mind of the utterer, and under which the words were used;<sup>h</sup>

<sup>a</sup> See Mackelvey Lehrb. § 158 b; Froben Erör. § 473; Pothier Traité des Oblig. Part I., Chap. I., sect. 1., art. 2.

<sup>b</sup> *Eaton v. Lyon*, 3 Ves. 692; *Butcher v. Butcher*, 9 Ves. 393; 3 E. & B. 749, 750.

<sup>c</sup> 13 East, 74 *Seddon v. Senate*.

<sup>d</sup> *Forth v. Chapman*, 1 P. W. 667; *Elton v. Eason*, 19 Ves. 77.

<sup>e</sup> *Morrell v. Frith*, 3 M. & W. 402; *Neilson v. Harford*, 8 M. & W. 806; *Cheveley v. Fuller*, 13 C. B. 122.

<sup>f</sup> *Goss v. Lord Nugent*, 5 B. & Ad. 64; *Spartali v. Benecke*, 10 C. B. 202; 2 Tay. Ev. 742, &c.

<sup>g</sup> *Smith v. Wilson*, 3 B. & Ad. 728, and the other cases cited in 2 Taylor Ev. § 837.

<sup>h</sup> *Bainbridge v. Wade*, 15 Jur. 572, Q. B.; *Edwards v. Jevons*, 8 C. B. 436; *Bell v. Welch*, 9 C. B. 154; *A. G. v. Powis*, Kay, 207.

c. The identity of the objects referred to.<sup>a</sup> And for these purposes such evidence is allowable, although the result may be an interpretation at variance with the apparent meaning of the words.<sup>b</sup>

#### NOTE TO § 53.

##### 1. Exercise of rights.

To the extent to which one person has a right to do, are other persons bound to suffer, and any damage which may accrue to them whilst he is exercising his right, affords them no valid ground of complaint against him. This may be illustrated by the obstruction of light and air, the diversion of watercourses, &c. where there is no prescriptive or other right in the person complaining. The loss occasioned in such cases is *damnum absque injuria*; <sup>c</sup> and the absence, juridically speaking, both of injury and damage, renders the maxim *sic utere tuo ut alienum non ledas* inapplicable. Although, however, the mere exercise of a right is in no case a wrong, any negligence accompanying the exercise, and causing loss to another, is an injury conferring upon him a right of action.<sup>d</sup>

##### 2. Effect of intention.

Roman jurists generally hold that an act which in itself may be considered as the mere exercise of a right, becomes unlawful if done solely to annoy another, and the doctrine is warranted by the clear words of the Digest XXXIX. tit. 3, de aqua, &c., L. 1, § 12, and L. 2, § 19. Others contend, however, that those who have to be guided by positive law cannot take cognisance of the motives from which an action proceeds, but must confine their attention to the act itself, and if the distinction between the motive urging to an act and the immediate object, the attainment of which is aimed at, be kept in view, this latter doctrine would seem to be the more correct, at all events in the opinion of English lawyers. Many cases may be cited to show that the question is not from what motive did an act proceed, but was the act justified by any right of the doer? <sup>e</sup> Whether the act is so justified, often, it is true, depends upon the intention of the doer, but seldom, if ever, upon his motives. For example, falsely to give a servant a bad character, is not unlawful unless done maliciously,<sup>f</sup> i.e. with the immediate object of damaging

<sup>a</sup> Bacon's Max. Reg. 25: *Lord Cheney's ca.*, 5 Co. 68 a; *Beaumont v. Fell*, 2 P. W. 141; *Doe v. Hiscocks*, 5 M. & W. 363; *Bernasconi v. Atkinson*, 10 Hare, 345.

<sup>b</sup> See, in addition to the cases in the last three notes, *Brown v. Byrne*, 3 E. & B. 703.

<sup>c</sup> See, for examples, the note to *Ashby v. White*, 1 Sm. L. C. 130; *Broom's Max.* 150; *Acton v. Blundell*, 12 M. & W. 341; 5 Hare, 428.

<sup>d</sup> Vin. Ab. *Consequential Losses*, A. 9, 22.

<sup>e</sup> See 1 Wms. Saund. 23 b; *Lucas v. Nockells*, 4 Bing. 744 and 10 Bing. 172; *Oakes v. Wood*, 2 M. & W. 791; *Trent v. Hunt*, 9 Ex. 14; *Wood v. Dixie*, 7 Q. B. 892; *Kirby v. Simpson*, 18 Jur. 983, per Martin, B.

<sup>f</sup> *Harris v. Thompson*, 13 C. B. 333.

the servant and not with a *bona fide* view to protect the enquirer. The motive, except so far as it is evidence of the end in view, is juridically speaking unimportant, as may be seen at once by supposing the bad character to be deserved, but to be given out of mere spite, a case in which, it is clear, no action lies.<sup>a</sup> Here moreover it is important to observe that the intention also is immaterial. Actions for malicious prosecution afford similar illustrations and show the importance of distinguishing motive from intention. A like doctrine obtains in Equity, as appears from the cases where appointments under powers have been held bad as not made *bona fide* for the end designed.<sup>b</sup> Upon the whole it would seem therefore that where a person's right is clear, what he may do in the exercise of it does not depend for its legality upon either his motive or his intention, but that there are acts the legality of which depends, not indeed on the motives by which the doer is urged, but on the immediate object he may have in view.<sup>c</sup> What these acts are cannot be stated in a general proposition; they form a small class having few other characters in common.

It is to be observed that the effect of intention upon an act not done in the exercise of a right is not here discussed. As to this, compare the maxims *Actus non facit reum nisi mens sit rea* and *Voluntas reputatur pro facto*. Broom's Max. p. 226. Jenk. Cent. 88, pl. 70. Vin. Ab. *Intent*, D.

### 3. Evading Laws.

It is of course never the intention of a legislator to suffer his laws to be evaded, and here again the Romans held an otherwise permitted act to be unlawful if done solely to evade a law, Code I. tit. 14. de leg. L. 5. The English decisions certainly do not go so far,<sup>d</sup> for admitting that a law is not made to be evaded, the question in each particular case is, simply, whether the act is or not forbidden by the law properly interpreted? If not, the mere fact that the act was done to evade the law is immaterial.<sup>e</sup>

#### NOTE TO §§ 60, 61.

##### Self defence, &c.

As to the English law on the subject of these two §§, see Blackst. Com.

<sup>a</sup> *Weatherstone v. Hawkins*, 1 T. R. 110; 1 Starkie on Libel, 294, 230. How far such conduct is, criminally speaking, indefensible, is another matter. 2 *ib.* 250.

<sup>b</sup> See *Ateyn v. Belchier*, 1 Wh. & Tud. L. C. 251, and the note there.

<sup>c</sup> As where a man moors his barge alongside a wharf, not to use it himself but solely to annoy another. *Anon.* 1 Camp. 517 n.

<sup>d</sup> See *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 475; in which limitations of property, made solely to evade laws, were upheld. But see the observations of Mr. J. Burnett, in 2 Ves. S. 142.

<sup>e</sup> This is not opposed to *The Bank of England v. Booth*, 7 Cl. & Fin. where it was held that what is prohibited to be done directly is illegal if done indirectly. See the same case, 2 Keen, 478, per Sir Wm. Follett *arg.*

vol. 3. p. 2, *et seq.*, and vol. 4. p. 181, *et seq.*, and the cases collected in Com. Dig. *Pleader* (3 M. 15) *et seq.*

See, as to actively enforcing one's own rights, *Newton v. Harland*, 1 Scott N. R. 474.

And, as to defending one's person and property, 3 Bl. Com. 3; Com. Dig., *Biens C*; *Alderson v. Waistell*, 1 Car. & Kir., 358.

#### NOTE TO § 62.

##### Roman Civil Process.

The translator met with great difficulty in understanding the writings of the Roman Jurists and of modern civilians, in consequence of his ignorance of the Roman forms of action and of their civil process. The supposition that others entering upon the study of Roman Jurisprudence will at first encounter similar obstacles, and the desire to remove them, should they exist, must be the apology for the insertion of the present note, which, however, does not profess to be more than an abridgment of what the reader will find at greater length, and in a far more satisfactory shape, in the following works:

Explication historique des Instituts, par M. Ortolan (4th Ed., Paris, 1847), vol. ii., p. 390, &c.

Cursus der Institutionen, von G. F. Puchta (2nd ed., Leipsig, 1846), vol. II., p. 6, &c.

Handbuch des Civilprozesses von D. A. Bethmann Hollweg (Bonn, 1834), and the same author's *Versuche über einzelne Theile der Theorie des Civilprozesses* (Berlin and Stettin, 1827).

Savigny's System, vol. 5.

The first two of these have been more especially used, and in them will be found the authorities by which the different statements are supported.

#### 1. LEGIS ACTIONES.

In the earliest stage of Civil procedure in ancient Rome, there were five modes of prosecuting one's rights (*actiones*), distinguished in later times by the epithet *actiones legis*. In these there was a *magistratus*, (who was always a senator,) to whom the plaintiff had to go both in the first instance for the appointment of a *judex* (by whom the case was to be decided), and in the last instance to enforce the execution of his decree. The *judex*, also a senator, was chosen by the plaintiffs themselves, or in case they could not agree, by the *magistratus*. The *actiones legis* were confined to Roman citizens, who were obliged to go through the whole process in person, *nemo alieno nomine lege agere potest*, and the complaint had to be framed with the strictest possible attention to the terms of the law on which the action was founded (Gaius, IV. 11). Of the five *actiones legis*, three were for the pur-

pose of arriving at a sentence, and two for enforcing it when obtained; they were as follows (Gaius, IV. § 12, &c.):

To obtain a sentence:

*actio sacramenti,*  
*judicis postulatio,*  
*condictio.*

To execute a sentence:

*manus injectio,*  
*pignoris capio.*

Of these, the *actio sacramenti* was the oldest, having once been the only *actio legis* known. The *actio per judicis postulationem* arose from the necessity the party complainant was in of stating precisely what he claimed, and the *actio per conductionem* arose from other inconveniences attaching to the *actio sacramenti*, but what they were in particular is not well known. However, after the introduction of the *actiones per judicis postulationem et per conductionem*, in every case not specially provided for by them, recourse was still had to the old *actio sacramenti*, and this form of procedure was retained long after the two others had fallen into disuse, and of it we have the fullest account.

The *actio sacramenti* took its name from the *sacramentum*, a sum of money deposited by each party in the hands of the college of priests; that deposited by the gainer being returned to him, and that deposited by the loser being applied for religious purposes. In later times this *sacramentum* was not actually deposited, but its payment, in case of failure in the *actio*, was secured by sureties called *prædes sacramenti*. The sentence was that the *sacramentum* of the gainer was *justum*, and consequently that that of his opponent was *injustum*. The *actio sacramenti* was the *actio* used for trying rights to property, and it is here that the first traces of the *vindicatio* of later times are to be found. The procedure is given by Gaius, and was, omitting details, somewhat as follows—The thing in dispute was brought before the *magistratus*, and originally the litigants fought about it, but afterwards, in token of their willingness so to do, they only touched it with a *vindicta* or *festuca* (the symbol for the original lance); hence this process was known as the *manuum consortio* and *vindicatio*. If the thing in dispute consisted of real property, the *magistratus* went with the litigants to the spot, and then one of the latter turned the other out and brought him before the *magistratus* (*deductio*). When, however, the *magistratus* had so much to do as to be unable to go in person, the litigants went before him and challenged each other to go and fight on the spot (*ex jure manuum consortium vocare*), which they were ordered to do in the presence of witnesses; then took place the *deductio quæ moribus fit*, and the parties returned to the *magistratus* with a part of the thing in dispute over which



the *vindicatio* took place. After this form had been gone through (and it was in later times gone through in words and not in fact) the *magistratus* commanded both to be quiet and each litigant then challenged the other to the *sacramentum*. The *magistratus* afterwards gave temporary possession of the thing vindicated to one of the parties (*vindicias dicere*) who had to give security to redeliver it with the mesne profits, should the action be ultimately decided against him; the sureties given for this purpose were called the *prædes litis et vindiciarum*.

Then came the appointment of the *iudex*.

The mode of proceeding when property was not claimed, but the performance of some *obligatio* was sought, is not well understood, but for this purpose the two other above mentioned *actiones legis* were invented.

Of the *actio per iudicis postulationem* little has been ascertained, but it seems to have been distinguished from the others by the fact that the *iudex* or *arbiter* had a certain latitude allowed him to determine the rights and duties of the litigants, whilst in the others he had only to pronounce whether the *sacramentum* was or not *justum*, or whether the defendant was or not bound to give up the particular thing demanded.

Of the *actio per condictionem* we only know that it was so named from the fact that the plaintiff called upon the defendant to be present within 30 days to have a *iudex* appointed, and that it was confined to cases in which the defendant was under an obligation *aliquid certum dare*.

Of the remaining two *actiones legis*, the *actio per manus injectionem* always took place *in jure* before the *magistratus*, and was the mode of obtaining possession of the person of the defendant in case the plaintiff had procured sentence against him for a sum of money which he could not pay. The defendant had 30 days given him (*dies justi*), and if, after that, the plaintiff was not satisfied he laid his hands upon his debtor who then became his slave *de facto*, and, unless a *vindex* could be found to redeem him, *de jure* also, and the debtor was *addictus* a slave to all intents and purposes.

This remedy was subsequently extended, and it was settled that upon certain events a person should be given up as a slave in the first instance *as if* he had been condemned (*pro judicato*), or without those words, simply that he should be claimable as a slave (*pura*). The *actio per manus injectionem* thus became in some cases an independent process, and was not necessarily pronounced in some other *actio*; there were in fact, ultimately, three forms of this action. 1. The old original *manus injectio iudicati*. 2. The *manus injectio pro judicato*. 3. The *manus injectio pura*.

The remedy *per pignoris capionem*, which enabled a creditor to take his debtor's goods, was confined to some few cases, (chiefly in favour of soldiers,) and was distinguished from all the other *legislationes* in being a remedy

which had not to be prosecuted *in jure*, but which might be taken by the private individual without any judicial assistance.

## 2. THE FORMULARY SYSTEM.

The second stage through which the Roman civil procedure passed, the formulary process, or the *ordinaria judicia*, sprung from the necessity of assisting *peregrini* in the maintenance of their rights, and from the unsuitable character of the *legis actiones* to a totally different state of society.

When a *peregrinus* complained of another, or of a *civis*, the strict *jus civile* was not applicable, and recourse was had to the prætor; he, after having heard the complaint, drew up in writing (*formula*) a short statement of the facts on which the plaintiff founded his claim (*DEMONSTRATIO formulæ*), together with directions as to the consequences which were to follow in case those facts were established or not (*CONDEMNATIO formulæ*). This formula was then laid before three or five *recuperatores* chosen by the litigants and approved by the prætor, and who were to say whether the facts were true or not. No question of law was referred to them; the formula was *in factum concepta*, and they had no control whatever over the consequence of their finding. When this process was extended to disputes between *cives*, the *jus civile* came into operation, and the formula was no longer in the simple form mentioned above, but the question submitted to the *judex* or *arbiter* was one of mixed law and fact; he was directed to ascertain whether the plaintiff's claim was one recognised by law, as well as whether the circumstances, on which he grounded it, were as he pretended; hence the formula was *in jus concepta*, and a new part, the *INTENTIO*, was inserted after or blended with the *demonstratio*. In case the dispute turned, not upon the title of either party to the property claimed by each of the litigants, but upon its quantum only, another part, the *ADJUDICATIO*, was added to the formula and by it the *judex* was directed to award to each what should turn out to be his due. The formulary process was extended to disputes relating to property by a fiction. Instead of the old *sacramentum* the defendant promised to pay to the plaintiff a sum of money if the plaintiff should prove entitled to the property in dispute (*sponsio præjudicialis*). This sum was not however paid, but the property being declared to belong to the plaintiff or the defendant the cause was at an end, and the plaintiff, if successful, took possession. The defendant had previously given security to deliver up the thing with all mesne profits in case he was condemned to pay the *sponsio* (*satisfactio pro præde litis et vindictiarum*.)

**Parts of the Formula.**—There were four principal parts of a formula, viz.,

1. *Demonstratio*, in which the thing sought was ascertained;

2. *Intentio*, in which the law upon which the claim rested was referred to, and which characterised the action;

3. *Adjudicatio*, in which the *judex* was desired to ascertain the extent of the rights of the plaintiff and defendant respectively; this part occurred only in the three actions *familiæ heriscundæ*, *de communi dividundo*, and *finium regundorum*.

4. *Condemnatio*, in which the consequences which were to follow the finding of the *judex* were stated; it always, originally, directed the *judex* to compel the defendant to pay money or to acquit him altogether; and according as the money to be paid by the defendant was stated in the *condemnatio* by the prætor, or was left to the judgment of the *judex*, either with or without a limit (*taxatio*), was the *condemnatio* called

$$\text{condemnatio} \begin{cases} \text{certæ pecuniæ} \\ \text{incertæ pecuniæ} \end{cases} \begin{cases} \text{cum taxatione} \\ \text{sine taxatione.} \end{cases}$$

Of the above four parts the third occurred only in the three forms of action already mentioned; the first and second were often, especially where property was claimed, blended together; in certain cases again the *intentio* stood alone, as where an adjudication was required upon such questions as "Is such a one *libertus*? or what is the extent of such a person's *dos*?" (*formulae præjudiciales* or *præjudicia*).

Gaius gives the following examples of the way in which the above portions of the formula were worded (Gaius, IV. §§ 39—43).

*Demonstratio*

QUOD AULUS AGERIUS NUMERIO NEGIDIO HOMINEM VENDIDIT.  
QUOD AULUS AGERIUS APUD NUMERIUM NEGIDIUM HOMINEM  
DEPOSUIT.

*Intentio*

SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X  
MILIA DARE OPORTERE.

QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE  
FACERE OPORTERE.

SI PARET HOMINEM EX JURE QUIRITIUM AULI AGERII ESSE.

*Adjudicatio*

QUANTUM ADJUDICARI OPORTET JUDEX TITIO ADJUDICATO.

*Condemnatio*

JUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X  
MILIA CONDEMNA: SI NON PARET ABSOLVE.

JUDEX NUMERIUM NEGIDIUM AULO AGERIO DUMTAXAT X  
MILIA CONDEMNA: SI NON PARET ABSOLVITO.

JUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO.

Besides the above-mentioned principal parts of the formula there were

others called *adjectiones*, inserted for some reason peculiar to each particular case.<sup>a</sup> These were

A. *Præscriptiones*, if inserted before the *intentio*. A *præscriptio* might be inserted

1. By the plaintiff, for the purpose of limiting his demand in case the usual words of the *intentio* were too large; or

2. By the defendant, for the purpose of raising some preliminary question which, if decided in his favour, would quash the formula, i.e. would prevent the *deductio in iudicium*. Of these, the three most important were called

a. *Præjudicia*, if the ground taken by the defendant was that the determination of the action would prejudice him in some other cause which ought first to be determined (Gaius, IV. 133).

b. *Præscriptio fori*, or what we should call a plea to the jurisdiction.

c. *Præscriptio temporis*, by which the defendant insisted that the plaintiff should have brought his action sooner. Hence the modern word prescription. The *præscriptiones* inserted by the defendant seem in later times to have come after the *intentio* and then to have been called *exceptiones*.

B. *Exceptiones*, *Replicationes*, &c., if inserted after the *intentio*: of these

1. The *exceptio* was inserted by the defendant, not to quash the formula by a preliminary objection, but to avoid the *condemnatio* by alleging some new fact to prevent the result which would otherwise have followed from a finding of the *intentio* in the plaintiff's favour (plea in confession and avoidance).<sup>b</sup>

2. The *replicatio* was inserted by the plaintiff, to destroy the effect of the defendant's *exceptio*, and bore the same relation to it as the latter bore to the *intentio*.

3. The *duplicatio*, *triplicatio*, &c., were inserted for similar purposes by the defendant and plaintiff respectively (rejoinder, surrejoinder).

After the pleadings came the

**Litis contestatio.**—*Litis contestatio*. *Contestari litem*<sup>c</sup> was a phrase used to designate the calling of witnesses by each party to a suit; it was the last act *in jure*, when the Roman civil process took place partly before a *magistratus in jure* and partly before a *iudex in iudicio*. *Lis enim tunc contestata videtur cum iudex per narrationem negotii causam audire*

<sup>a</sup> The celebrated words *nisi restituat* inserted in the *condemnatio*, and by which the inconvenience of condemning the defendant to pay damages only was avoided, were probably first inserted as an *adjectio*. See 2 Ort. 445, 452.

<sup>b</sup> The formula being "*Si paret condemnato, si non paret absoluto*," a mere denial by the defendant of the plaintiff's *intentio* was not necessary: a simple traverse (*litis contestatio negativa*), is not denoted by the term *exceptio*. 2 Puchta Inst. 157, 165; Mackeldey's Lehrb. § 200 a.

<sup>c</sup> Equivalent to the expression *post litem contestatam* are the following—*post iudicium ordinatum vel acceptum, post litem inchoatam*. 2 Puchta Inst. 182.

*cæperit*. Cod III. tit. 9, de lit. con. l. 1. This shows the meaning of the expression after the disappearance of the old formulary system. The *litis contestatio*, which may not perhaps be very improperly rendered *joinder of issue* (*et inde producit sectam*) was an important stage in the Roman Civil process, and had a material influence on the rights of the parties. Its most important effects were the following—<sup>a</sup>

1. A new *obligatio*, *quasi ex contractu*, was thereby imposed on all the parties to the suit to continue it.

2. The suit became *pendens*.

3. Time which had begun to run ceased to do so.

4. The suit was capable of being continued by or against the representatives of either party in case of his death, although it might not have been maintainable in the first instance by or against such representatives.

5. The sentence related back to this time, so that the successful party was entitled to all such benefits as he would have derived if judgment had then been given for him: *post litem contestatam omnes incipiunt mala fidei possessores esse*, is a maxim illustrative of this principle.

6. The choice exercised by the plaintiff, with respect to the ground on which he based his claims, was irrevocable.

7. The thing in dispute became *res litigiosa*, and was incapable of being dealt with in any way prejudicial to either party.

8. The original ground of action became merged in the *obligatio* arising from the *litis contestatio*.

**Evidence.**—Issue being joined the next step was to ascertain the facts.

This, however, was dispensed with if they were admitted, or if the plaintiff put the defendant to his oath, or if the defendant refused to continue to defend. With respect to the first it was a maxim that *confessus pro judicato est*, Dig. XLII. tit. 2. With respect to the second; the plaintiff had a right to call upon the defendant to swear whether the plaintiff was or not entitled to recover; if the defendant swore either way, his oath was conclusive as against the plaintiff; but if the defendant would not swear, judgment was given against him unless he put the plaintiff on his oath, in which case the oath which the plaintiff might make was also conclusive; but if the plaintiff refused the oath the defendant was absolved. Dig. XII. tit. 2. An oath, when called for by the plaintiff is *jus jurandum delatum*, when demanded by the defendant *relatum* (*deferre*, *referre*); and the suit, when either party put the other to his oath, is *in jurandum demissa*. The law is thus summed up by Ulpian (Dig. XII. tit. 2, l. 34, § 9.)—" *Quum res in jus jurandum demissa sit—judez jurantem absolvit, referentem audiet, et si actor juret con-*

<sup>a</sup> See 1 Vang. § 160; Mackel. § 200; Puchta Pand. § 96; 1 Mühl. Pand. § 144; 1 Warnk. Com. Jur. priv. 320.

*demnet reum: nolentem jurare reum, si solvat absolvit, non solventem condemnat, ex relatione non jurante actore absolvit reum."*

**The Decree.**—Judgment was pronounced by the *judex*; and in form he closely followed the direction to him contained in the formula. In an *actio præjudicialis*, in which the *judex* had only to make a report but to give no judgment, and the formula of which contained no *condemnatio*, the *judex* merely returned his opinion upon the evidence laid before him, e.g. *ingenuum videri; servum non videri*. In other cases the *judex* had either to condemn or absolve the defendant, or, in actions for partition, to adjudicate to each party the portion he was to have. As a rule, the defendant only could be condemned or absolved, but there were some actions (*judicia duplicia* or *actiones mixtæ*), in which the plaintiff could be condemned at the instance of the defendant. A judgment adverse to the defendant was always to the effect that he should pay a certain specified sum of money (Gaius, IV. 48, 52). With the judgment, the duties of the *judex* and all proceedings in *judicio* ceased; to execute his sentence recourse was again had to the prætor.

**Execution.**—The modes of executing a judgment were, during the formula system, as follows—

Against the Defendant's	{	person alone . . . . .	<i>Manus injectio.</i>
		person and property, as an entirety . . . . .	<i>Missio in possessionem.</i>
	{	property alone, which was taken	wholly, in case of insolvency { as an entirety . . . . . <i>Bonorum cessio.</i>
			{ per singulas res . . . . . <i>Bonorum distractio.</i>
			partially, in cases of solvency . . . . . <i>Pignoris capio.</i>

If the sentence of the *judex* was disputed, an *actio judicati* was instituted before execution could issue. This *actio* was decided by the *magistratus*.

The process by *manus injectio* did not reduce the defendant to a state of slavery as under the old system of the *leges actionis*, but he was detained by and compellable to work for the benefit of the plaintiff (*duci jubere*).

In case of a *missio in possessionem*, the entirety of the property (*universitas*) of the defendant was, after due notice, put up for sale under the inspection of a *magister*, and became vested in the highest bidder (*emptio bonorum*); the defendant suffered a *diminutio capitis*, and was completely discharged from all liabilities under which he then was.

In case of a *bonorum cessio*, the *universitas* of the defendant (except his rights of *status*) was ceded by him voluntarily to his creditors, and was sold by them, and the proceeds were applied for their use; the defendant suffered no *cap. diminutio*, but remained answerable for all unsatisfied debts.

In case of a *distractio bonorum*, all the property (but not as an *universitas*) of the debtor was sold by a *curator* who saw the proceeds properly applied; the defendant suffered no *cap. dim.* and remained answerable for all unsatisfied claims.

In case of a *pignoris capio*, so much only of the defendant's property as was required for the purpose of satisfying the claims of the plaintiff was seized. The seizure was made by an *executor* of the *magistratus*, who either caused the same to be sold for the benefit of the plaintiff, or addicted them to the plaintiff, who thereby became the owner. The plaintiff did not, as in the time of the *legis actiones*, himself make the seizure *extra jure*.

### 3. EXTRAORDINARIA JUDICIA.

In the third and last period of the Roman law of civil process, established in the time of Justinian, the offices of *judex* and *magistratus* were united; there was consequently no formula, but the judicial officer took extraordinary cognisance of the subject of litigation (*extraordinaria cognitio*, *extra ordinem cognoscere*), and himself settled the matter from first to last. There were four cases in which the *magistratus*, before the system became general, proceeded in this way.

1. Where no reference to a *judex* was by the nature of the case required; as in cases of a *cessio in jure*, or where the facts were all admitted, &c.
2. Where such power was specially conferred by law.
3. Where it was necessary to do justice between parties who could obtain it in no other way.
4. Where force was required to be exercised for carrying out decrees, &c.

### 4. CLASSES OF ACTIONS.

**In rem, in personam.**—*Quot genera actionum sint verius videtur duo esse, in rem et in personam . . . in personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est, id est cum intendimus dare, facere, præstare, oportere. In rem actio est cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, &c. Gaius, IV. §§ 1, 2.*

*Omnium actionum . . . summa divisio in duo genera deducitur; aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est vel ex contractu, vel ex maleficio . . . et aliis quibusdam modis, aut cum eo agit qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam, quo casu proditæ actiones in rem sunt: veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, et possessor dominum se esse dicat; nam si Titius suam esse intendat, in rem actio est. Inst. IV. tit. 6, § 1.*

*Actionum genera sunt duo: in rem quæ dicitur vindicatio, et in personam, quæ conditio appellatur. In rem actio est per quam rem nostram, quæ ab alio possidetur, petimus et semper adversus eum est qui rem possidet. In personam actio est qua cum eo agimus qui obligatus est nobis ad faciendum aliquid, vel dandum et semper adversus eundem locum habet. Ulpian Dig. XLIV. tit. 7 de O. et A. L. 25 pr.*

In order to understand this division of actions it is necessary to bear in

mind that the expression *in rem* was used by the Romans, not in its literal, but in a technical, sense as equivalent to absolute, general, undetermined and opposed to *specialiter*; and that the division of actions into those *in rem* and *in personam* was not founded on any corresponding division of rights, but that the division by the moderns (for the ancients had it not) of *jura in rem* and *jura in personam* was founded upon the above-mentioned Roman division of actions. However, the division of actions into those *in rem* and those *in personam* will be best understood if reference is made to the nature of the rights which they were respectively instituted to protect, and to the Roman mode of bringing actions. Now, all civil rights are divisible into two great classes, viz., those with which anybody, and those with which only some ascertained person or persons can interfere.<sup>a</sup> The duty correlative to a right of the first class is imposed upon all persons indiscriminately, and not by virtue of any particular transaction in which they have taken part; whilst a duty correlative to a right of the second class is imposed upon some person or persons in particular, by virtue of some transaction in which such person or persons have themselves been concerned.

In case of an injury to a right of the first kind, the *intentio* of the plaintiff's formula was general, and the name of the person against whom the action was brought was not inserted, the plaintiff relying entirely on his right available against every other person—*si paret hereditatem ex jure quiritium Auli Agerii esse*, &c., and actions brought for an injury to such right, and framed generally in this way, were technically called actions *in rem*.

In case of an injury to a right of the second kind, the *intentio* of the plaintiff's formula was special, and the name of the person against whom the action was brought was inserted, the plaintiff relying on some particular duty imposed on the defendant solely by virtue of some special circumstance—*si paret NUMERIUM NEGIDIUM Aulo Agerio sestertium decem milia dare oportere*, &c., and actions brought for an injury to such a right, and framed specially in this way, were technically called actions *in personam*.

The terms *in rem* and *in personam* only had reference to the mode in which the *intentio* of the formula was framed; the *condemnatio* was never general, but was in both kinds of action directed against the particular defendant. Moreover, there were some actions in which, as in the interdicts, the *intentio* of the formula was general,<sup>b</sup> although they were themselves more analogous to actions *in personam*, than to those *in rem*; such were called *in rem scriptæ*, e. g. the actions *ad exhibendum*, *quod melius causa*.

<sup>a</sup> See Braun Erör., § 61; Froben, § 62; 2 Thibaut Vers. 23, &c.; 2 Puchta Coursus, § 165.

<sup>b</sup> As was always the case when the formula was *in factum concepta*. 2 Ortolan Inst. 458.



**Actiones mixtæ.**—*Sequens illa divisio quod quædam actiones rei persequendæ gratia comparatæ sunt, quædam pænæ persequendæ, quædam mixtæ sunt, Inst. IV. tit. 6, § 16.*

*Quædam actiones mixtam causam obtinere videntur, tam in rem quam in personam: qualis est familia herciscundæ actio, quæ competit cohæredibus de dividenda hereditate, &c., Inst. IV. tit. 6, § 20.*

*Mixtæ sunt actiones in quibus uterque actor est, utputa finium regundorum, familia herciscundæ, communi dividundo, interdictum uti possidetis, utrubi. Dig. XLIV. tit. 7, L. 37, § 1.*

The term mixed is generally considered as applicable to those actions only in which each party is looked upon as *actor*; and the propriety of the term, as designating actions partly *in rem* and partly *in personam*, is denied by Thibaut,<sup>a</sup> on the ground that the general right of the plaintiff was not so much sought to be established (it not being denied, unless by way of *præjudicium*) as to be clearly fixed with respect to the objects over which it was exerciseable: such actions he considers as merely *in personam*, and they are so called in the Code, VII. tit. 40, l. 1, § 1. The *intentio* of the formula could not be both *in rem* and *in personam*, i.e. framed generally without the name of the defendant and specially with his name at one and the same time.

In the *actio mixta*, in Ulpian's sense, i.e. where either party might be active or passive, either might be mulcted, whereas in other actions this could only happen to the defendant. The three cases mentioned by Justinian as examples of the *actio mixta* are the only ones in which both an *adjudicatio* and a *condemnatio* could be made.

**Actiones in jus, in factum conceptæ.**—According as the *intentio* of the formula was *in factum* or *in jus concepta* were actions divided into two classes with similar names.

The *actio in factum* was the origin of the formulary system, and, being used at first only by *peregrini*, was not allowable when the questions in dispute had to be settled by the *jus civile*. It was much used in after times for the decision of cases in which the *jus civile* either gave no remedy, even though *cives* alone were concerned, or gave one not appropriate, according to the changed opinions of the times. In the *actio in factum*, the *demonstratio* and *intentio*, properly speaking, were both wanting; the formula as given by Gaius, IV. 47, ran thus—

JUDEX ESTO. SI PARET AULUM AGERIUM APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE, EAMQUE DOLO MALO NUMERII NEGIDII AULO AGERIO REDDITAM NON ESSE, QUANTI EA RES ERIT TANTAM PECUNIAM JUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET ABSOLVITO.

<sup>a</sup> See Froben, § 62.

The above formula if *in jus concepta* ran thus—

JUDEX ESTO. QUOD AULUS AGERIUS APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSITUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET EX FIDE BONA EJUS JUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO, NISI RESTITUAT. SI NON PARET ABSOLVITO.

Care must be taken not to confound actions, the *formula* of which was in *factum concepta*, with the action called *actio in factum præscriptis verbis* or *actio præscriptis verbis* or *actio in factum*. This action was founded on the *jus civile*, was in *jus concepta* and, its *intentio* being uncertain, was often denominated *actio civilis incerta*.<sup>a</sup>

**Actiones directæ, utiles, fictitiæ.**—According as actions were or 'not strictly founded on the *jus civile* were they called *directæ* or *utiles*; of the latter there were two sorts, viz., actions in which the *jus civile* was not noticed at all, and actions in which the *jus civile* was ostensibly relied on, but by a fiction, was made to extend to a case not properly within it. With reference to the frame of the formula, regarded from this point of view, actions were<sup>b</sup>

Actiones	{	directæ.
		utiles { in factum conceptæ. in jus conceptæ — fictitiæ.

The fictions employed were of the following nature—"if something were true (which is not true and nobody pretends to be true) and if certain consequences would, upon such supposition, follow upon a logical application of the *jus civile* to the facts stated, then such consequences shall follow now."

Examples of such fictions are given by Gaius, IV. § 34, 6, 7.

JUDEX ESTO. SI AULUS AGERIUS, LUCIO TITIO HÆRES ESSET, TUM SI PARET FUNDUM DE QUO AGITUR EX JURE QUIRITIIUM EJUS ESSE OPORTERE, &c., or, if *in personam*, TUM SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE, &c.

So again—

JUDEX ESTO. SI QUEM HOMINEM AULUS AGERIUS EMIT ET IS EI TRADITUS EST ANNO POSSEDISSET, TUM SI EUM HOMINEM DE QUO AGITUR EJUS EX JURE QUIRITIIUM ESSE OPORTERET, &c.

So again—

JUDEX ESTO. SI PARET OPE CONSILIOVE DIONIS HERMÆI LUCIO TITIO PURTUM FACTUM ESSE PATERE AUREÆ, QUAM OB REM EUM SI CIVIS ROMANUS ESSET, PRO PURE DAMNUM DECIDERE OPORTERET, &c.

**Actiones stricti juris, bonæ fidei.**—Another division of actions was

<sup>a</sup> See 2 Ortolan Inst. 470; 2 Puchta Cursus, § 130.

<sup>b</sup> 2 Ortolan Inst. 467—470; 2 Puchta Cursus, 122, &c.

into *actiones stricti juris*, *bonæ fidei* and *arbitrariæ* (Inst. IV. tit. 6, §§ 28—31.). This division was of *actiones in jus conceptæ* only; it did not, properly speaking, apply to those in *factum conceptæ*.<sup>a</sup>

Actions in *personam*<sup>b</sup> were divided, according as their formula was drawn up with reference to the strict principles of the civil law or with reference to that and the notions of morality current at the time, into *actiones stricti juris*, and *actiones bonæ fidei* respectively. The formula in the latter class of actions differed from that in the former by the addition, in the *intentio*, of the words, EX FIDE BONA OR UT INTER BONOS BENE AGIER OPORTET OR 'QUOD ÆQUIUS MELIUS, or of others to the like purport. Actions *stricti juris* lay for the purpose of enforcing the due performance of some obligation which was entirely one-sided, and the defendant, if he had any grounds of defence available by strict law, was compelled to state them in the formula by way of *exceptio*. Actions *bonæ fidei*, on the other hand, were more used in case an obligation in the defendant was linked with some other obligation, arising out of the same transaction, and to be performed by the plaintiff; moreover the defendant might avail himself of any righteous defence, without stating it in the formula by way of *exceptio*.

Actions in *rem* (and they alone properly)<sup>c</sup> were, after the introduction of the important words NISI RESTITUAT, called *arbitrariæ*, from the *jussus* or *arbitrium* which, if performed, dispensed with the payment by the defendant of the sum in which he was mulcted; the *arbitrium* was made according to what was proper, *ex æquo et bono*.

The term *arbitrariæ* was afterwards applied indiscriminately to all actions,<sup>d</sup> in which the defendant was ordered to do something, or in default pay a sum assessed.

The above divisions may be thus tabulated—

$$\text{Actiones} \begin{cases} \text{in } \textit{jus conceptæ} \\ \text{in } \textit{factum conceptæ} \end{cases} \begin{cases} \text{in } \textit{personam} \begin{cases} \textit{stricti juris.} \\ \textit{bonæ fidei.} \end{cases} \\ \text{in } \textit{rem} \dots \textit{arbitrariæ.} \end{cases}$$

#### NOTE TO § 63.

##### Interdicts.

An interdict in the largest sense was an order issuing from the prætor on the application of one party commanding some other to do or not to do certain acts. (Inst. IV. tit. 15, pr. & § 1.) In its stricter sense, an interdict

<sup>a</sup> See, as to these actions, 2 Ortolan Inst. 471, &c.; 2 Puchta Coursus, 119.

<sup>b</sup> 2 Ortolan, 475, 478.

<sup>c</sup> *Ib.* 476.

<sup>d</sup> *Tam in rem quam in personam.* Inst. IV. tit. 6, § 31.

was confined to a command of the latter description, a command to *act* being generally called a *decretum*. (Gaius, IV. § 140. Inst. IV. tit. 15, § 1.) An interdict, *inter* [*duos e-*] *dictum*, issued from the prætor in the first instance; <sup>a</sup> if obeyed, there was no occasion for any further proceeding, but if not obeyed, then the interdict, standing in the place of a formula, was referred to a *judex* who had to determine whether it should be obeyed or not.<sup>b</sup> Gaius, IV. § 141.

## NOTE TO § 64.

**Real and Personal Rights.**

By far the best examination of the nature of rights *in rem* and rights *in personam*, with which the translator is acquainted, is to be found in the second vol. of Thibaut's *Versuche*, p. 23, &c. From what is said in the text and in the note to § 62 (*ante* p. xl.), the student will, it is hoped, be able to gather what is meant by these expressions as used by writers on the Roman system of jurisprudence.

## 2.

The term real in English does not correspond with the Latin expression *in rem*, nor is the word personal equivalent to the phrase *in personam*. Land is the type of reality, and, if our early legal writers are consulted, it will be found that they always use the word real in connection with land. Real actions were those which were brought for the recovery of land or for the protection of rights annexed to the ownership thereof.<sup>c</sup> Real things are land and those incorporeal hereditaments which are annexed to the ownership of land.<sup>d</sup> The real representative is he, who on the death of a land-owner inherits his land. From denoting land and the rights annexed to its ownership the word real was also used to denote the extent of a person's interest therein; and, so applied, those interests in land are real which are not limited in duration to a certain definite time, and which, upon the death of the owner in whom they reside, descend or are capable of descending (if they do not cease altogether) to his heir at law. Thus, real feuds were those which on the death of the grantee devolved upon his heir,<sup>e</sup> and a

<sup>a</sup> If a case was stated to which, according to the previously published edict, an interdict was applicable.

<sup>b</sup> Savigny, *Recht des Besitzes*, § 34, p. 447, &c.: Several precedents are given by Ortolan, in his *Explic. des Inst.* vol. II. p. 628. Savigny's work being translated into English, the reader is referred to that book for further information as to interdicts. There is also an excellent article upon this subject in the *Dictionary of Greek and Roman Antiquities*.

<sup>c</sup> Bract. Lib. III. c. 3, § 3 & 4; Diversity of courts, in *Horne's Mirror*, p. 301.

<sup>d</sup> 2 Black. Com. c. 2 & 3 ib. p. 144; Fearn's *Posthumous works*, 8.

<sup>e</sup> Craig *jus feudale*, Lib. I. Dieg. 10, § 7.

person's real estate was, in a case of doubt, held to be land wherein he had an interest capable of being inherited, and no other.<sup>a</sup> At the present time this double signification of the word real is well established, and is the main cause of the difficulty which presents itself when an attempt is made accurately to define its meaning.<sup>b</sup> Opposed to real is the word personal; and, when applied to things, also the word chattel. All civil actions, all things are either real or personal. Nothing is or can be both so long as the words are used with reference to the same object. Each of these words personal and chattel is, however, ambiguous. That thing is personal, or a chattel, which is not land or anything annexed thereto, and that right is personal which has a chattel for its object, or which, whatever its object, is limited in duration to a certain definite period, and, upon the death of the person in whom it resides, devolves, if it does not cease altogether, upon his executor or administrator. A term of years in land is at the same time both real and personal, real as regards what is holden, and personal as regards the duration of the right of the holder: hence its name *chattel real*, in which, as the reader will observe, each word has reference to a different object. On the other hand, annuities, offices, &c., having nothing to do with land, are not deemed the less personal, simply because, on the death of him in whom they are vested, they may descend to his real representative as such. A comparison of the legal with the equitable use of the expressions in question, would seem rather to add to than remove the confusion; for, owing to the doctrines of conversion and the mode in which mortgages are regarded by courts of Equity, that which is at Law clearly real is often in Equity as clearly personal. Nevertheless, from the mode in which the words real and personal have long been used, it may be gathered that—

1. As applied to actions, these words had reference to the thing sought to be recovered; and not, except perhaps indirectly, to the extent of the right of the demandant.<sup>c</sup>

2. As applied to property, the words real and personal have reference as well to the object as to the extent of ownership: that only being real which is real in both respects, and that being personal which is either personal in both respects or in one respect real and in another personal.

The term personal is also used to denote a right or duty vested in a person for some reason peculiar to himself, and therefore not transferable to another, e.g. an office of trust, the liability arising from an assault, &c. Hence a further ambiguity in the word personal; and it may be observed

<sup>a</sup> *Rose v. Bartlett*. Cro. Car. 292.

<sup>b</sup> See Austin Prov. Jur. appx. XLIV.

<sup>c</sup> It must be remembered that damages alone were originally recoverable in ejectment. 3 Bl. Com. 200.



1. Perfect—answering to the elective concurrence of others, and in which one action is totally excluded by success in another.

2. Partial—in which one action is excluded by success in another, so far as the object of both is identical; but, by having some further object, is maintainable for that.

3. Apparent only and not real.

He excludes from consideration, as falling under a different principle, those cases in which the mere *election* of one action excludes all the others; i. e. he excludes all cases of, what Mackelvey terms, alternative objective concurrence. Consistently with his own principles Savigny is right, for in the cases under consideration, the person entitled has to choose, not between different modes of obtaining the same end, but between different ends to be obtained, and when he has exercised his option in this respect, his right to pursue any other end than that chosen is gone.<sup>a</sup>

The doctrine of concurrence of actions is closely allied to that of the *exceptio rei judicatæ*; the same consideration of identity of object enters into both, but into the latter the further consideration of identity of cause of action is important.

## 2.

The main doctrines of the English law upon this subject seem to be as follows:

1. An act which amounts to felony cannot be made the ground of any civil judicial proceeding against the person committing it, until he has been prosecuted for the felony.<sup>b</sup>

2. A person may at the same time proceed both at law and in equity against another to enforce two rights which, not being inconsistent, are distinct in their nature, although they arise from the same transaction.<sup>c</sup>

3. But, except in the case of a mortgagee, who may simultaneously pursue all the remedies open to him,<sup>d</sup> no person can at the same time proceed both at law and in equity to gain what is substantially the same object,<sup>e</sup> although if he fail at law, he may afterwards sue in equity.<sup>f</sup>

4. Where at law several modes of proceeding are applicable to the same case, the person aggrieved may adopt which he likes.<sup>g</sup> If he is successful

<sup>a</sup> See Puchta Pand. § 87; and his Vorlesungen I. 480, &c.; Thib. Civ. Abh. 156, 7; Post, note to § 80 a.

<sup>b</sup> *Ex parte Elliott*, 2 Deac. 179; *Crosby v. Leng*, 12 East, 409; *Stone v. Marsh*, 6 B. & C. 551; *Wickham v. Gatrill*, 18 Jur. 768.

<sup>c</sup> *Fennings v. Humphrey*, 4 Beav. 1.

<sup>d</sup> *Burnell v. Martin*, Doug. 417; *Cockell v. Bacon*, 16 Beav. 158; *Paynter v. Carver*, Kay, appx. 36; 2 Ves. S. 678; 1 Sch. & Lef. 176.

<sup>e</sup> *Reynolds v. Nelson*, 6 Madd. 290; *Ambrose v. Nott*, 2 Hare, 649; *Orme v. Brough-ton*, 10 Bing. 537.

<sup>f</sup> *Barker v. Smark*, 3 Beav. 64; 2 Vern. 33.

<sup>g</sup> *Slade's ca.*, 4 Co. 92 b; *Com. Dig. Action (M)*.

he cannot, although discontented, resort to any of the others;<sup>a</sup> nor can he if he is unsuccessful; unless indeed his failure has left the merits of his case still unascertained.<sup>b</sup>

## NOTE TO § 71.

**Effect of Death on rights to sue.**

By the law of England, in case of the death of a person in whom, solely, a right or duty resides, his rights to sue and liabilities to be sued devolve upon different persons, viz., upon his real or his personal representative.

**Real Representative.**—1. An heir may sue—

A. For the recovery of property descended to him.<sup>c</sup>

B. Upon a covenant running with land descended to him, or relating to land which would have descended to him if the covenant had been performed.<sup>d</sup> It is no objection that the breach occurred in the ancestor's lifetime, if the effect of the breach is to damage the heir and not to diminish the personal estate of the deceased.<sup>e</sup>

C. But an heir cannot, *as such*, sue upon any contract not relating to land,<sup>f</sup> nor, except for injuries to the tombstones, &c. of his ancestors, for any tort.<sup>g</sup> Those actions which have been held to lie for continuing nuisances and non-repairs, are only apparent and not real exceptions to the last part of this rule.

2. An heir may be sued in respect of contracts annexed to lands descended to him,<sup>h</sup> and also in respect of charges on such lands. Moreover, if expressly named with his ancestor, an heir may be sued in respect of that ancestor's contracts under seal, although not relating to land.<sup>i</sup> But heirs are in no case, *as such*, liable in respect of other matters; nor are they in any case liable beyond the value of the land descended from the ancestor from whom the obligation is inherited.<sup>k</sup>

**Personal Representative.**—1. An executor or administrator may sue—

A. For the recovery of any personal property of the deceased.<sup>l</sup>

<sup>a</sup> *Per* Lord Mansfield, 2 Burr. 1010.

<sup>b</sup> Com. Dig. *Action* (I) to (L); *Perrin's ca.*, 6 Co. 7 *a*.

<sup>c</sup> Theloall Dig. Or. Wr. I. c. 16, § 2, 4; Co. Lit. 18 *b*.

<sup>d</sup> Sh. Touch, 175; F. N. B. 145 C.; Com. Dig. *Covt.* (B. 2.).

<sup>e</sup> *Kingdon v. Nottle*, 1 M. & S. 354; 4 M. & S. 53; *Jones v. King*, 4 M. & W. 188.

<sup>f</sup> Theloall, *loc. cit.* § 5, where it is said to have been formerly otherwise.

<sup>g</sup> *Corren's ca.*, 12 Co. 105; Vin. Ab. *Heir* (Q). 1 Chitty Plead. 75.

<sup>h</sup> *Spencer's ca.*, 5 Co. 16; Sh. Touch, 167; Vin. Ab. *Heir* (Q. 3.) (Q. 4.); *Harbert's ca.*, 3 Co. 11 *b*.

<sup>i</sup> Sh. Touch, 167, 177, 178; Vin. Ab. *Oblig.* (O. 5.).

<sup>k</sup> *Harbert's ca.*, 3 Co. 11 *b*; 2 Black. Com. 243.

<sup>l</sup> Com. Dig. *Administration* (B. 13.).



B. Upon any contract made with the deceased and the breach of which causes a loss to his personal estate.<sup>a</sup>

C. For any injury to his personal property, diminishing the value thereof;<sup>b</sup> for any injury to his real property committed not more than six months before his death;<sup>c</sup> and for an injury to the person of the deceased if it occasioned his death.<sup>d</sup> But as to all other matters the old principle *actio personalis moritur cum persona* still holds good.<sup>e</sup>

2. An executor or administrator may be sued upon all obligations of the deceased which arise *ex contractu* or *quasi ex contractu*,<sup>f</sup> (except those in which performance by him in person is essential<sup>g</sup>); also for any wrong done by the deceased six months before his death, and affecting the real or personal property of another.<sup>h</sup> But as to other matters the above maxim is still law.<sup>i</sup>

Those cases in which the representatives of a person deceased can sue or be sued in respect of causes arising since his death, are not pertinent to the matter in the text (which relates merely to the surviving of remedies), and are therefore omitted here.

#### NOTE TO §§ 72—76.

See *ante* note to § 62, p. xxxii.

#### NOTE TO § 77.

##### Renunciation.

The reader will observe that, in the text, the renunciation by a person of rights vested in him is spoken of. Such a renunciation is not to be confounded with a disclaimer, by which a person refuses to accept rights others may wish to confer upon him. In English law books this distinction is not always drawn, and cases are often brought together which relate some to one, and some to another, of these two different classes of acts. See Viner's *Ab. Disclaimer*. The reason for this probably is that land vests in the alienee, &c., until he dissents; so that when he disclaims he in fact renounces a vested right.<sup>k</sup>

With respect to renunciation properly speaking, the effect of it depends

<sup>a</sup> F. N. B. 145 D.; Shep. Touch. 175; *Kingdon v. Nottle*, 1 M. & S. 361; *Chamberlain v. Williamson*, 2 M. & S. 408.

<sup>b</sup> 4 Ed. III. c. 7; 1 Wms. Ex. 669.

<sup>c</sup> 3 & 4 Wm. IV. c. 42, § 2.

<sup>d</sup> 8 & 9 Vic. c. 93.

<sup>e</sup> See Broom's *Maxims*, 702.

<sup>f</sup> *Pinchon's ca.*, 9 Co. 86 b; Com. Dig. *Administration* (B. 14.); 2 Wms. Ex. 1464; 3 De G. Mc. & G. 645.

<sup>g</sup> Cro. El. 553; 2 Wms. Ex. 1467.

<sup>h</sup> 3 & 4 Wm. IV. c. 42, § 2.

<sup>i</sup> See 2 Wms. Ex. 1470, *et seq.*

<sup>k</sup> Co. Lit. 111 a; Sh. Touch. 285.

upon what is renounced. Some rights, or apparent rights, are so accompanied by duties as to be wholly incapable of being renounced, e.g. the right (?) of a person to his own life. There are other rights, or apparent rights, which exist solely in consequence of duties immediately imposed by law for the general welfare of the community, and such rights (?) are also incapable of being renounced.<sup>a</sup> All rights, strictly speaking, that is those which answer to relative duties (note 3 to § 1) can, however, if they are separable from the duties which usually accompany them, be renounced, either generally if the right is *in rem* (e.g. a dedication of a way to the public), or in favour of some particular person, namely the person in whom the correlative duty resides. This principle is usually expressed by saying *quilibet potest renunciare juri pro se introducto*.<sup>b</sup> A renunciation in favour of a particular person, is commonly termed a release. A renunciation, if general, seems to require no particular formality,<sup>c</sup> but a release, which is in fact a transfer operating by confusion, requires in some cases (depending upon the nature of the right released) to be evidenced by a formal deed.<sup>d</sup>

The effect of a release in general words will be found stated in Lit. § 508 to 513 and Com. Dig. *Release* (E.)

## NOTE TO § 78.

**Alienation.**

The power to alienate is so essential to ownership that, except in a few cases not falling under any one general principle, a proviso or condition to restrain alienation is treated as of no avail.<sup>e</sup> Nevertheless, there are many rights which by their nature are not alienable at all,<sup>f</sup> (e.g. the right of an officer to his full or half-pay) whilst there are others which are transferable in equity, but not at law<sup>g</sup> (e.g. debts). Upon principle, and upon the authority of the many cases to which the reader will be led by referring to the sources mentioned in the notes, the general doctrines relating to the transfer of rights and duties by the act of him in whom they reside may be stated as follows—

## I. Duties, if

1. Absolute, cannot be aliened at all.
2. Relative, can only be aliened with the consent of those in whom the

<sup>a</sup> See 2 Ves. J. 227; *Lee v. Read*, 6 Jur. 1026, S. C. 5 Beav. 381; *per* Pollock, C. B., in *Barbat v. Allen*, 7 Ex. 609; *R. v. Smith*, 17 Jur. 24.

<sup>b</sup> As to which see Broom's Max. 546.

<sup>c</sup> See *Townson v. Tickell*, 3 B. & A. 31; *Doe v. Smyth*, 6 B. & C. 112; *R. v. Lloyd*, 1 Camp. 262.

<sup>d</sup> See 2 Add. Con. 1178, &c.; *Shep. Touch.* 320.

<sup>e</sup> Lit. § 360 &c.; *Ware v. Cann*, 10 B. & C. 433; *Rochfort v. Hackman*, 9 Hare, 475.

<sup>f</sup> See the cases cited in 2 Wh. & Tud. L. C. 590.

<sup>g</sup> Sh. Touch. 240; Co. Lit. 214 a; *Roe v. Dawson*, 1 Ves. S. 331.

correlative rights reside; and even then the transaction does not amount to a transfer of the existing duty, but to the extinguishment of it, and the creation of another entirely new, though similar, duty.<sup>a</sup>

## II. Rights, if

1. *in rem*, are alienable both at law and in equity if vested,<sup>b</sup> and, if their object be lands, tenements, or hereditaments, even if not vested.<sup>c</sup>

### 2. *in personam*,

A. arising *ex contractu* or *quasi ex contractu*, are alienable in equity,<sup>d</sup> but not at law,<sup>e</sup> except

a. The contract relates to land, and is annexed to an interest in it which has been itself transferred.<sup>f</sup>

b. In the case of bills of exchange and bank-notes.<sup>g</sup>

c. By virtue of special statutes.<sup>h</sup>

B. Arising *ex delicto* or *quasi ex delicto*, are not alienable either at law or in equity.<sup>i</sup>

But the above principles are qualified by the following:—

No right which, by its very nature, is personal to him in whom it resides, is capable of being aliened by him to another.<sup>k</sup>

A mere right to litigate cannot, as such, be transferred to another either at law or in equity.<sup>l</sup>

NOTE TO §§ 79, 80.

## **Void Transactions.**

### 1.

A transaction forbidden by law is clearly void, i. e. it cannot be permitted to have the effect intended, or any similar effect.<sup>m</sup> But it is by no means true that a void transaction has *no* effect, for not only may it subject the parties to it to pains and penalties, but it may render void another transaction itself lawful, but inseparably mixed up with the first; it may also give

<sup>a</sup> See 2 Add. Con. 1108 *et seq.*

<sup>b</sup> Com. Dig. *Assignment* (A) and *Grant* (C); Shep. Touch. 238.

<sup>c</sup> 8 & 9 Vic. c. 106, § 6.

<sup>d</sup> *Row v. Dawson*, 1 Ves. S. 331.

<sup>e</sup> Com. Dig. *Assignment* (C) and *Grant* (D); Shep. Touch. 240.

<sup>f</sup> 1 Wms. Saund. 240, &c.; 32 Hen. VIII. c. 34, § 1.; 1 Ch. Pl. 18; *Spencer's ca.*, 1 Sm. L. C. 22.

<sup>g</sup> *Miller v. Race*, 1 Sm. L. C. 250.

<sup>h</sup> See 1 Wms. Saund. 210, note a.

<sup>i</sup> Com. Dig. *Assignment* (C. 1); 1 Chitty Pl. 75.

<sup>k</sup> Com. Dig. *Officer* (C); *Dignity* (E); Vin. Ab. *Assignment* (D).

<sup>l</sup> See Com. Dig. *Grant and Assignment*; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; and the heads *Maintenance* and *Champerty* in the books on Criminal Law, &c.

<sup>m</sup> See *Bartlett v. Vinor*, Carth. 252; Chitty on Contracts, c. 4., and the note to *Collins v. Blantern*, 1 Sm. L. C. 168; 1 Wms. Saund. 309 *et seq.*

rise to a right *in personam* available against the wrong-doer and which he cannot resist on the ground that what he did was void.<sup>a</sup>

In determining what acts are and what are not void on the ground that they are contrary to the provisions of a statute, it is important to discover whether the intention of the legislature was that the acts in question should be void, or that they, remaining valid, should give rise to consequences which, in the absence of the statute, would not have flowed from them. Much, of course, depends here upon the particular wording of the statute in question, but it has been held that

1. The annexation of a penalty to transactions does not render them void, if the penalty is annexed *solely* for revenue purposes.<sup>b</sup>

2. The annexation of a penalty, not solely for revenue purposes, is alone sufficient to make a transaction void; because a penalty implies a prohibition.<sup>c</sup>

3. The non-observance of formalities merely *directed* by a statute to be observed, does not render a transaction void.<sup>d</sup> But whether a statute is in this respect *directory* or not, must, in each case, depend upon the language and intention of the legislature.<sup>e</sup>

2.

That a person cannot recover back money paid by him in pursuance of an illegal contract is laid down by Wilmut, C. J., in *Collins v. Blantern*, 1 Sm. L. C. 165. See also 2 Smith L. C. 297, &c.

3.

As to the maxim *quod ab initio non valet, in tractu temporis non conalescit*, see Broom's Maxims, 132.

4.

For instances of transactions, in part valid and in part invalid, see *Kerrison v. Cole*, 8 East, 236; *Phillpotts v. Phillpotts*, 10 C. B. 85; *Lane v. Horlock*, 1 Drew. 587; *Barrington v. Liddell*, 2 De G. Mc. & G. 495; 3 E. & B. 33.

5.

The doctrine in the text called *conversio actus juridici* seems to correspond with the principle of our own law that where parties to a transac-

<sup>a</sup> *Catchpole v. Ambergate Rail. Co.*, 1 E. & B. 111; *Robinson's ca.*, 2 De G. Mc. & G. 517.

<sup>b</sup> *Swan v. Bank of Scotland*, 2 Mont. & Ayr. 661; *Johnson v. Hudson*, 11 East, 180. Of course, if the object of the legislature is to forbid an act, the imposition of a penalty which is to be applied to increase the revenue does not render such act legal. See *Smith v. Marshood*, 14 M. & W. 452; *Taylor v. The Crownland Gas Co.*, 13 Jur. 913, Ex.

<sup>c</sup> *Bartlett v. Vinor*, Carth. 252; and the two cases last cited.

<sup>d</sup> *R. v. Birmingham*, 8 B. & C. 29; *Nowell v. Mayor of Worcester*, 9 Ex. 457; *R. v. St. Mary Magdalen*, 2 E. & B. 809; *Stansfeld v. Hellawell*, 7 Ex. 373; *Fagg v. Nudd*, 3 E. & B. 650.

<sup>e</sup> See 1 Smith L. C. 170.

tion wishing to carry out a legal and clearly-expressed intention have, nevertheless, proceeded so to do in a mode which is inadequate, that mode will, if possible, be treated as some other which is adequate. *Quum quod ago non valet ut agam valeat quantum valere potest.* See *Stapilton v. Stapilton*, 1 Atk. 8; *Thompson v. Attfield*, 1 Vern. 40; *Rigden v. Vallica*, 2 Ves. S. 252; *Thorne v. Thorne*, 1 Vern. 141; *Stansfeld v. Hellawell*, 7 Ex. 373; *Shep. Touch.* 511, 514; 1 Prest. Ab. 312.

## NOTE TO § 80 A.

**Alternative Duties.**

## 1.

In case of an alternative duty, the person entitled has a right to this or that, but at the option of the person obliged. In the case of the simple duty mentioned in the text, the person entitled has a right to performance in one definite way only; but the person obliged, by virtue of some *beneficium*, is entitled to set up as a defence to an action founded on that right, some other performance, which, however, his opponent had in no sense a right to require. Hence, if the duty is alternative and the person entitled claims performance in one way exclusively, or if, the duty being single, he claims performance in the alternative, viz. either of that to which he has a right, or of that which the person obliged has a right to substitute, the claim will be too extensive and must fail. See § 33 Inst. de act. (4. 6). Braun Erör. § 84. Pothier Oblig. § 244; also *Penny v. Porter*, 2 East, 2: *R. v. The South East. Rail. Co.*, 17 Jur. 901.

## 2.

If A. being bound to pay B. 50*l.*, or give him a horse, by some excusable mistake does both, A. can have back which *he* likes; for the very object of the *condictio indebiti* is to rectify the consequences of mistake. This view is supported by the authority cited in the text, although some writers, relying on L. 26. § 13, de condict. indeb. (12. 6), are of a different opinion.

Where a joint duty is doubly performed more difficulty arises. Suppose A. and B. are jointly bound to pay C. 50*l.* or give him a horse, and by some excusable mistake both discharge the obligation; two cases are then possible, viz. :—

1. A. and B. discharge the obligation at different times; then clearly the last in point of time can recover back what he parted with, for there was not any obligation for him to discharge.

2. A. and B. may at the same time discharge the obligation by giving C. both the money and the horse. C. is in this case clearly entitled to retain either the whole of the money or the whole of the horse, and cannot therefore be compelled to make restitution *pro rata*, and the law Cod. de cond. indeb.

(12. 6), decides that he has the option to retain which he likes, and, also as he likes, to make restitution to A. or B. [Braun Erör. § 84.]

## 3.

By the English law, as by the Roman, unless there is some reason to the contrary, a person obliged by contract or otherwise to do this or that, can do which *he* likes, the option being with him.<sup>a</sup>

Apparent but not real exceptions to the rule are the following ;—

1. In case of an alternative legacy the option is with the legatee ; his benefit being the main object of the testator.<sup>b</sup>

2. The option as to which of several remedies a person will pursue rests with him.<sup>c</sup> There is not here any alternative duty but one duty with several modes of enforcing its performance.

3. A duty, the non-performance of which gives rise to a liability of a penal nature, confers no option on the person obliged. See *post* note to § 81.

Whether the option is with the person obliged or with the person entitled, when it is once declared a change of mind is not allowed.<sup>d</sup>

As to alternative duties, performance of which in one way becomes impossible, see Com. Dig. *Condition* (K. 2).

## NOTE TO § 81.

**Penalties.**

A person bound under a penalty to do or forbear, cannot at his option pay the penalty, and so release himself from his duty. The penalty, whether imposed by law or by agreement, is regarded merely as an additional security for due performance.<sup>e</sup> On the other hand a person who undertakes to act in a certain way, and, if he does not, then to pay a sum of money as *liquidated damages*, is under an alternative duty, and can at his option act as agreed or pay the money.<sup>f</sup>

A penalty imposed by agreement, being looked upon merely as an additional security for the damage to be really incurred in case the agreement

<sup>a</sup> *Woodward v. Gyles*, 2 Vern. 119 ; *Robinson v. Robinson*, 1 De G. Mc. & G. 247 ; *R. v. The South-Eastern Railway Co.*, 17 Jur. 901 ; *Layton v. Pierce*, 1 Doug. 15 ; *Penny v. Porter*, 2 East, 2 ; Co. Lit. 145 a.

<sup>b</sup> *Haggar v. Neatby*, Kay, 379.

<sup>c</sup> 4 Co. 95 a.

<sup>d</sup> 1 Doug. 16 a note ; *R. v. Hungerford Market*, 4 B. & Ad. 327 ; see *Simpson v. Ingham*, 2 B. & C. 65 ; Com. Dig. *Annuity* (C).

<sup>e</sup> See *Bartlett v. Vinor*, Carth. 252 ; *Chilliner v. Chilliner*, 2 Ves. S. 528 ; *Hardy v. Martin*, 1 Cox, 26.

<sup>f</sup> *Woodward v. Gyles*, 2 Vern. 119 ; *Sainter v. Ferguson*, 1 Mc. & G. 286 ; 4 Burr. 2228.

is not duly observed, can only be enforced to the extent necessary to compensate the damage actually resulting from a breach of the contract.<sup>a</sup>

As to what stipulations impose penalties, and what amount to undertakings to pay liquidated damages, see *Kemble v. Farren*, 6 Bing. 141, and Chitty on Contracts, chap. 6.

#### NOTE TO § 83.

#### **Extinguishment of Rights.**

##### 1.

The doctrines of confusion, extinguishment, and merger of rights and duties, all depend upon the simple principle, that when a right and its correlative duty both reside in one and the same person, each destroys the other. As an example of this, and to illustrate what is said in the text as to several rights meeting in the same individual—Suppose a person having a right of way over a field to become the owner of the same field; the right of way, restricting the rights of ownership, as it would if vested in another person, ceases to have any existence as such, and is merged or extinguished in those rights which are then of course no longer restricted by the extinguished right.

Another maxim is, that an accessory follows the fate of its principal. If, consequently, in a case of suretyship a creditor succeeds to his debtor, the principal debt is extinguished and the sureties are released. [Froben, § 85.]

##### 2.

The above principles are constantly met with in our own jurisprudence, and will be found illustrated in Viner's Abridgment, title *Extinguishment*, and in the celebrated essay on merger, forming the third volume of Mr. Preston's Treatise on Conveyancing.

When a right and its correlative duty meet in the same person in different capacities, mutual destruction is not necessarily the result.<sup>b</sup> The remedy by which the right is ordinarily enforced, and that alone may be affected, as in the case of a creditor who is appointed his debtor's executor.

There is a class of cases in which, without any confusion of rights and duties, a plurality of rights gives rise to a merger of some of them. The principle may be stated in some such way as the following: Of several rights which have the same object, and which are not related to each other as principal and accessory, that which is "of a higher nature" merges that

<sup>a</sup> See *Sloman v. Walter*, 1 Bro. C. C. 418, and the note thereto in 2 Wh. & Tud. L. C. 786; 8 & 9 Wm. III. c. 11, § 8; 4 & 5 Anne, c. 16. §§ 12 & 13; 1 Wms. Saund. 57.

<sup>b</sup> See § 108 and note thereto; Vin. Ab. *Exting.* B.

which is of a lower nature.<sup>a</sup> For example, a bond merges a simple contract debt for which it may have been given,<sup>b</sup> and a judgment, of a court of record, merges the cause of action upon which it has been obtained.<sup>c</sup> The last doctrine is evidently capable of being supported upon the salutary principle *nemo debet bis vexari pro eadem causa*; but it is usually rested upon the more technical ground above stated. Hence it is held that the judgment of a foreign court, not being of a “higher nature” than the cause of action on which it is founded, does not merge it.<sup>d</sup> What the true reason for the higher-nature principle is, remains obscure; but it would seem that the principle is one which rather affects the remedy of which the person entitled may avail himself, than the existence of his original right.<sup>e</sup>

## NOTE TO § 84.

## Concurrence of Rights.

## 1.

When several rights which cannot all be fully exercised are vested in several persons, their competition gives rise to difficulties which most Continental writers have attempted to solve by relying upon principles applicable to *privilegia* alone. It will be observed that those cases only in which there is nothing special to determine which right is to be preferred to the other, are, strictly speaking, cases of collision; so that the real difficulty is reduced to the cases falling under the head 3 B 6 in the text. If the collision is indirect, i. e. if A. and B. both have rights to one and the same thing, and that thing is divisible, the right of each can be restricted until both are satisfied, as is done every day where there is a competition of creditors whose demands abate *pro rata* and are paid to the fullest extent possible. But if the collision is direct, i. e. if A. has a right against B., and B. a similar right against A., no process of halving can lead to any satisfactory result; for if A. is to have half only of his right as against his equal opponent B., the latter must of course have half of his right against A., and then the matter rests essentially as before. When, therefore, nothing can be gained by division or abatement *pro rata*, both rights are brought to a standstill, and neither is exerciseable.<sup>f</sup> This is generally expressed by saying *privilegiatus contra æque privilegiatum non privilegio suo sed jure communi*

<sup>a</sup> *Higgen's ca.*, 6 Co. 44 b; *Owen v. Homan*, 3 Mc. & G. 378; *Vaughan v. Vanderslegen*, 2 Drew. 289.

<sup>b</sup> *Price v. Moulton*, 10 C. B. 561; *Schack v. Anthony*, 1 M. & S. 572.

<sup>c</sup> *Higgen's ca. ubi sup.*; *Austin v. Mills*, 9 Ex. 288.

<sup>d</sup> *Hall v. Order*, 11 East, 118.

<sup>e</sup> See *re Griffith*, 3 De G. Mc. & G. 174; *Hookpayton v. Bussell*, 9 Ex. 279; 1 Chitty Plead. 116; *Drake v. Mitchell*, 3 East, 251.

<sup>f</sup> See § 84 n. s.



*utitur*. In some cases, however, it is by the Roman law allowable to decide the question by lot, as is stated in the passages cited in the text.<sup>a</sup> [Froben, § 86.] The reader will find this subject examined at length in 2 Thibaut's Vers. p. 242, &c.

## 2.

In consequence of our system of civil jurisprudence being composed of two different sets of doctrines known as Law and Equity, nothing is more common than to find legal and equitable rights in manifest conflict with each other. The legal right, i.e. that right which is founded upon so much of our jurisprudence as is emphatically called *Law*, is paramount in Westminster Hall, whilst the equitable right, i.e. that right which is founded upon so much of our jurisprudence as is called *Equity*, is supreme at Lincoln's Inn. As it often happens in other cases, so here; the result of this conflict is a state of things by no means so prejudicial as might at first be supposed, and whatever difference of opinion may exist as to the machinery by which the practical result is obtained, it may perhaps be considered doubtful whether the wants of the English are worse supplied by law and equity together than the wants of other people are by a system of jurisprudence free from such antagonistic forces.

With respect to the collision of rights, the following appear to be the main principles observed in this country:—

1. *Qui prior est tempore potior est jure* is a doctrine which both at law and in equity decides between persons who, in other respects, stand upon equal ground.<sup>b</sup>

2. In courts of law, equitable rights, although not wholly ignored,<sup>c</sup> cannot be actively or passively enforced.<sup>d</sup>

3. In courts of equity, it is held that where there is equal equity the law must prevail, or, as another writer has it, "law and equity both, shall prevail against equity only."<sup>e</sup>

4. Another and very sensible principle, confined however to courts of equity, is, that where there are several creditors of the same person, and some of them can only proceed against part of his property, whilst others can proceed not only against that, but also against some other part, the latter persons must first proceed against that part against which the former cannot proceed. This is what is called marshalling securities or assets.<sup>f</sup>

<sup>a</sup> § 84, n. x.

<sup>b</sup> Broom's Maxims, 260; *Rice v. Rice*, 2 Drew. 73.

<sup>c</sup> *Boddington v. Castelli*, 1 E. & B. 66, 879; *Close v. Phipps*, 4 Man. & Gr. 586.

<sup>d</sup> *Edwards v. Lovendes*, 1 E. & B. 81; *Pardoe v. Price*, 16 M. & W. 451; *Wake v. Tinkler*, 16 East, 36.

<sup>e</sup> Grounds & Rud. 174; see 1 Story Eq. Jur. § 64 c; 1 Fonb. Eq. 321.

<sup>f</sup> See 1 Story Eq. Jur. c. 13; *Aldrich v. Cooper*, 2 Wh. & Tnd. L. C. 49.

## NOTE TO § 86.

**Conditions.**

## 1.

Something or other is essential to every transaction ; in other words, in every transaction there is something or other without which the transaction is itself inconceivable. In a sale, for example, there must be something sold as well as a price. If therefore transactions are to be divided into conditional and unconditional it is evident that what is, by the very nature of the transaction, essential to its existence cannot be called a condition : if it be, all transactions are necessarily conditional. In order to make any such classification, the term condition must be confined to some event naturally unessential to a transaction, but on the happening of which event the transaction is nevertheless made to depend. [Froben, § 88], and see Plow. 25.

## 2.

For the English law of conditions the reader is referred to Sheppard's Touchstone, c. 6 : Littleton's Tenures, c. 5, and Coke's Commentary on it ; Perkin's Profitable Book, c. 2 ; and the title *Condition* in Comyn's Digest, and Bacon's and Viner's Abridgments. In Fearn's well-known Essay on contingent remainders, one branch of the subject is discussed with a learning and ability which needs no comment here. The student should however bear in mind that in consequence of the very limited meaning given to the term condition by many old writers on real property law (viz. an event on the happening of which the *grantor* or *his heirs* could *re-enter* on land previously parted with), much that is said by them is calculated rather to obscure than illustrate the nature of conditions in general.

## NOTE TO § 87.

**Conditions precedent, subsequent.**

## 1.

The division of conditions into precedent and subsequent, has reference to the right affected. A condition, precedent with reference to the right to be newly acquired, is subsequent with reference to that which must cease on such acquisition ; and a condition, subsequent with reference to the right to be defeated, is precedent with reference to that which is then to revert. When therefore conditions are divided into precedent and subsequent, it must be remembered that the division is not absolute, every condition being in fact both, but relative to the right which it is most important to consider ; a condition being precedent or subsequent according as the acquisition or loss of *that* right depends upon it. The same principles exactly apply to both kinds of conditions, although the results are very different. This difference

is however in all cases due to the fact that a condition precedent affects the transfer of a right in the first instance, whilst a condition subsequent has no effect whatever upon the original transfer, but solely upon the re-transfer. See Thibaut Civil. Abh. No. 17.

## 2.

The doctrines relating to conditions precedent and subsequent were discussed at great length in the recent case of *Egerton v. The Earl of Brownlow*, when on appeal in the House of Lords (18 Jur. 71.) and in the case of *Scott v. Tyler*, 2 Bro. C. C. 431.

## NOTE TO § 88.

**Possible conditions.**

Conditions are generally divided into two classes, according as the person whose rights are to be affected by them can or cannot himself perform them. The ordinary course of nature is looked upon as sure to continue; so that a condition, capable of performance upon that supposition only, belongs to the first class and not to the last. The last class may be divided into those, performance of which is wholly independent of the will of the person to be affected, and into those, to a greater or less extent, but not (even on the above supposition) wholly dependent on him.<sup>a</sup> So that we have as stated in the text

$$\text{conditiones} \begin{cases} \text{potestativa.} \\ \text{non potestativa.} \end{cases} \begin{cases} \text{casuales.} \\ \text{mixta.} \end{cases}$$

## NOTE TO § 89.

**Derisory conditions.**

For instances of a *conditio derisoria*, or as we call it a *brutum fulmen*, see the cases where marriage has been attempted to be restrained, *Harvey v. Aston*, 1 Atk. 361, and the note there; *Scott v. Tyler*, 2 Wh. & Tud. L. C. 89, and the great case of *Egerton v. Brownlow*, 1 Sim. N. S. 464, and, on appeal in the House of Lords, 18 Jur. 71.

## NOTE TO § 90.

**Effect of conditions.**

## 1.

In the language of the Romans<sup>b</sup> *conditio pendet*—so long as the event has not happened but may still happen;

*existit*—when the event has happened (as explained in § 90 (II.);

*deficit*—when the event cannot happen.

<sup>a</sup> Froben, § 90.

<sup>b</sup> Mackelidey Lehrb. § 171.

With the qualifications mentioned in the text, it is laid down that after performance of a condition the contract to which it was annexed is to be considered as having been unconditional from the first. Although therefore if the condition is precedent, an alienor has *plenum jus* until the condition happens, when it does happen the circumstances are *a posteriori* wholly altered. If the condition is subsequent there is still more reason for the doctrine, for the whole object of such a condition is, in a given event, to place the alienor in the same position as he was in before. [Froben, § 92.]

## 2.

Nothing is more clear than that when a grantor reenters upon the happening of a condition subsequent, he is in as of his old estate, and is not bound by any mesne incumbrances, &c.<sup>a</sup> Moreover it is laid down that he who is to have a thing on the happening of a condition precedent is to take it in the state in which it was when the condition was *annexed*. His title has relation back to that time.<sup>b</sup> But on the other hand it is nowhere stated that the right acquired or reacquired on the happening of the condition relates back so as to deprive the person in whom the right was previously vested of the profits derived by him, whilst he was merely enjoying that right, and it is apprehended that in no case is such the law.<sup>c</sup>

## 3.

Notwithstanding the general principle that where a duty is to arise only on performance of a condition, it cannot be enforced until after such performance, it is a well established rule of law, that where a condition has been partly performed and a defendant has received a benefit thereby, he cannot, if sued for non-performance on his part, defend himself upon the ground of the incomplete performance of the condition by the plaintiff. In such a case if the defence suggested were to prevail, the defendant would obtain a benefit for nothing, and to avoid so unfair a result his only right is to seek compensation in respect of so much of the condition as is not performed.<sup>d</sup>

## NOTE TO § 91.

**Impossible conditions.**

## 1.

It is not unusual to say that impossible conditions are void.<sup>e</sup> If this were

<sup>a</sup> Lit. § 358; Co. Lit. 202 a; Shep. Touch. 154.

<sup>b</sup> Sh. Touch. 155.

<sup>c</sup> See *Hughes v. Thomas*, 13 East, 474; and *Goodtitle v. Newman*, 3 Wils. 526, where heirs presumptive are said to be entitled to the rents received by them after their ancestor's death and prior to the birth of a posthumous heir.

<sup>d</sup> Compare the note to *Pordage v. Cole*, 1 Wms. Saund. 320 d, with *Graves v. Legg*, 9 Ex. 709.

<sup>e</sup> Shep. Touch. 132, 133; Vin. Ab. *Condn.* V. (C. a.) (D. a.).

strictly speaking correct, such conditions would produce no effect, which is not the case. For—

A. Affirmative impossible conditions,

a. the impossibility of which is of a physical nature, postpone for ever the right which is to arise on their fulfilment. Such conditions, if precedent, leave matters as they are, and, if subsequent, render the right intended to be defeated wholly unconditional.<sup>a</sup>

b. the impossibility of which is juridical only, arising from the unlawfulness of the event which is to happen, have the same operation. Until the event occurs the condition is not in any sense fulfilled, and when the event has occurred notwithstanding its illegality, the unlawfulness of the event necessarily prevents its taking effect in the mode intended.<sup>b</sup> Where the fulfilment of the condition is not unlawful, although the condition is so, e.g. a condition not to marry, the condition does not belong to the present class.

B. Negative impossible conditions offer more difficulty. First, it is to be observed that, by a negative impossible condition, is meant, one which is fulfilled by the forbearance from or non-happening of an event which cannot, or should not occur.

a. If the event is one which, physically speaking, cannot happen, the condition is fulfilled as soon as annexed, and cannot therefore operate by way of postponement. But such a condition may, if obviously at variance with the intention of the person imposing it, be wholly left out of consideration.

b. If the event is one which, legally speaking, ought not to occur, its actual occurrence is *ex hypothesi* a breach of the condition; for this is only fulfilled by non-occurrence. Hence, so long as occurrence of the event is in fact possible in the manner and form in which it is not to occur, so long must such a condition be deemed unfulfilled, and, unless derisory, produce the usual effect of postponement.

In attempting to apply these principles, the student must not confound with impossible conditions those which, although illegal, do not in fact belong to the negative or to the affirmative impossible class. E. g. conditions not to alien, not to marry, &c. which are illegal, not because to alien or to marry is so, but because restraints on alienation and marriage are against the policy of the law; such conditions are fulfilled, neither by any illegal act, for forbearance to alien or marry is not illegal, nor by forbearance from an illegal act, but by forbearance from one in every way legal. Even these conditions are not void; for where they are not mere *bruta fulmina* (which often

<sup>a</sup> Co. Lit. 206.

<sup>b</sup> See in addition Com. Dig. *Condn.* (D. 1. 3. 7.)

depends more upon the form in which they are expressed than on the end to be attained <sup>a</sup>) they have the ordinary effect of *possible* conditions.<sup>b</sup>

## 2.

Conditions may be possible when they are annexed, and yet become impossible before fulfilment. The following cases are all that are here conceivable. The impossibility may arise—

A. Independently of the will of any of the parties interested; namely :

1. By what is called an act of God; or

2. By the act of some third person.

B. By the act of the parties interested, viz. :

1. Of him who is to suffer by the non-fulfilment of the condition; or

2. Of him who is to gain by that event.

C. By a combination of two or more of the above.

An examination of all these possible cases will lead to the following results, namely :

1. Where fulfilment becomes impossible by the act of the party to be benefited by non-fulfilment, the condition is deemed fulfilled.<sup>c</sup>

2. In all other cases the condition is not fulfilled, and operates accordingly.<sup>d</sup>

3. Where fulfilment of a condition is, at any moment, impossible, in consequence of the act of the party to perform it, the condition is *then* deemed unfulfilled, and operates accordingly, although the impossibility *might* cease so as to render fulfilment at the time appointed possible.<sup>e</sup>

## 3.

The two propositions in the text at the end of this section (91) depend upon the simple doctrine that, whilst no honourable man will stipulate for a *premium virtutis* for abstaining from doing wrong, there is no reason why a person should not bind himself to pay a penalty in case he does that which is unlawful. [Froben, § 93.]

## NOTE TO § 92.

**Performance of conditions.**

With respect to the fulfilment of conditions,

1. It is clear that both at law and in equity performance according to the intention of the parties is all that is in fact necessary.<sup>f</sup>

<sup>a</sup> *Brandon v. Robinson*, 18 Ves. 429; *Rockford v. Hackman*, 9 Hare, 475; Co. Lit. 206 b.

<sup>b</sup> See *Egerton v. Brownlow*, 1 Sim. N. S. 464, and 18 Jur. 71; *Scott v. Tyler*, 2 Wh. & Tud. L. C. 80, and the note there; Co. Lit. 206.

<sup>c</sup> Co. Lit. 206 b, 207 a; Com. Dig. Cond. (L. 6.).

<sup>d</sup> Shep. Touch. 133, 157; Co. Lit. 206 a; Com. Dig. Cond. (D. 1.) (L.).

<sup>e</sup> Lit. § 355—358, and Coke's Com. thereon; *Ford v. Tiley*, 6 B. & C. 325.

<sup>f</sup> Shep. Touch. 139, 140; Co. Lit. 219 b; Com. Dig. Cond. (G. 14.) *Tracey v. Lawrence*, 2 Drew. 403.

2. If the condition is disjunctive, performance in any one of the ways appointed is sufficient.<sup>a</sup>

3. Courts of Equity, in order to ascertain the intention of the parties, look more to the nature of the transaction than to the words in which the intention is expressed; whilst Courts of Law adhere more closely to the latter. Hence, whenever a condition is obviously annexed solely for the purpose of securing payment of a sum of money to one of the parties to the contract imposing the condition, if the money is not paid precisely at the time fixed, relief against the strictly legal consequences of the breach can be obtained from courts of Equity upon payment of the money with interest.<sup>b</sup> But, as such relief is against consequences flowing from the breach of a contract deliberately entered into, the tendency is rather to restrict than to extend the cases in which the courts of Equity interfere.

#### NOTE TO § 93.

##### Time.

A limitation of time (*dies*) is distinguished from a condition by being certain. A condition, as we have before seen (§ 86, and note thereto), is an uncertain event upon the happening or not happening, of which, rights are made dependent. *Dies* denotes either a day certain, or an event sure to happen, although it may be doubtful *when*. The most obvious consequence of this is that, whilst a condition postpones the acquisition (or, as the case may be, re-acquisition) of a right, a limitation of time does not affect the vesting of a right but only its enjoyment.<sup>c</sup>

The application of the terms *dies cedit* and *dies venit* is clearly stated by Ulpian (Dig. L. tit. 16, l. 213). *Dies cedit* denotes that a right is vested; *dies venit* denotes that it is now exercisable. Hence, *dies cedit et venit* denotes a right vested in possession; *dies cedit sed non venit* denotes a right which is vested, but the enjoyment of which is postponed; and *dies nec cedit nec venit* denotes a right which is not vested, but is wholly contingent.

#### NOTE TO § 94.

##### Computation of Time.

In Co. Lit. 134 b *et seq.*; 2 Black. Com. 140, and Com. Dig. *Ann. & Temps*, the student will find the English law respecting the computation of time. In this place it is only necessary to remark that,

1. In computing periods of time, fractions of days are either omitted

<sup>a</sup> Shep. Touch. 138, 139; Co. Lit. 225 a.

<sup>b</sup> 2 Story Eq. Jur. c. 34; *Peachy v. Somerset*, 2 Wh. & Tud. L. C. 774; *Hill v. Barclay*, 18 Ves. 56; *Reynolds v. Pitt*, 19 Ves. 134.

<sup>c</sup> See 3 Sav. System, § 125.

from calculation altogether, or are counted as whole days, according to circumstances.<sup>a</sup>

2. Except as between the crown and a subject,<sup>b</sup> events which happen on the same day (be it an ordinary day or a fictitious day) are deemed to happen according to their actual priority.<sup>c</sup>

3. That priority will be attributed to simultaneous acts which is necessary to give effect to the intention of the parties to them.<sup>d</sup>

4. Whether the first and last days of a period of time are to be taken both inclusively or exclusively, or whether one of them only, and which, is to be included, is, in every case, a matter of intention, and where this is not wholly free from doubt, the construction, *ut res magis valeat quam pereat*, will be adopted.<sup>e</sup>

No other principle than this can be deduced from the reported decisions, which are very conflicting. Upon the whole, however, it seems that in cases of doubt

1. The tendency is to exclude from computation the day from which a period of time is to be reckoned, and to include the day on which an act has to be performed.<sup>f</sup>

2. Both days are very rarely included.<sup>g</sup>

3. But are not infrequently excluded.<sup>h</sup>

Sunday is reckoned like any other day; and an act which is valid only if done within a certain number of days, the last of which is a Sunday, must, if illegal if done on that day,<sup>i</sup> be performed at latest on the Saturday previous.<sup>k</sup>

#### NOTE TO §§ 97—99.

##### Delay.

The delay spoken of in the text is delay in the performance of a duty, and not delay in the exercise of a right. In order that there may be delay of the kind in question, a time must be fixed for performance, and that time

<sup>a</sup> Co. Lit. 135 b; 5 Co. 1 a; *R. v. St. Mary Warwick*, 1 E. & B. 816.

<sup>b</sup> *R. v. Edwards*, 9 Ex. 32.

<sup>c</sup> *Whitaker v. Wisbey*, 12 C. B. 44, where the question was much discussed.

<sup>d</sup> *Digge's ca.*, 1 Co. 174 b; *Fitzwilliam's ca.*, 6 Co. 33 b.

<sup>e</sup> *Pugh v. The Duke of Leeds*, 2 Cowp. 714; *R. v. Stevens*, 5 East, 244; *Lester v. Garland*, 15 Ves. 248; *Wilkinson v. Gaston*, 9 Q. B. 137.

<sup>f</sup> Chitty's Statutes, *Time*, vol. III. p. 1376; 1 Prest. Ab. 288; *Hardy v. Ryle*, 9 B. & C. 603.

<sup>g</sup> Woolrych on Legal Time, 144.

<sup>h</sup> *Ibid.*, 148.

<sup>i</sup> See Com. Dig. *Temps* (B. 3.) for the acts which may and may not be done on a Sunday.

<sup>k</sup> *R. v. The Justices of Middlesex*, 7 Jur. 396; *Brewster v. Thorpe*, 11 Jur. 6; *Rowberry v. Morgan*, 9 Ex. 730.



must have elapsed. If the time for performance is expressly fixed by agreement or otherwise, such time must of course be observed. If however no time is expressly fixed, a *reasonable* time must be allowed to expire before the person bound can be considered as in delay,<sup>a</sup> and the whole life of the person bound may not be unreasonable.<sup>b</sup> Moreover a person cannot be considered as in delay, although the period of time allowed for performance is expired, if a condition precedent be still unfulfilled, e.g. where a previous request has to be made.<sup>c</sup>

Supposing however that there is delay strictly speaking, its most material and general consequences are as follows:—

1. Delay gives rise to a claim for damages, and consequently, it has been said, for interest where the delay is in non-payment of money.<sup>d</sup> But, in consequence of the rule of the common law by which interest was not payable in the absence of express agreement, interest was not, and is not even now, always obtainable *eo nomine*, although the loss of it by the creditor can hardly be excluded from consideration in awarding the damages to which he is entitled by delay.<sup>e</sup> Where there is delay in the performance of a contract, an action for damages arising from the delay and a suit for the specific performance of the contract may both lie.<sup>f</sup>

2. Delay by one party to a contract, where a time is fixed for performance, gives the other at Law a right to rescind it,<sup>g</sup> except where, by the contract itself, the legal ownership in its subject matter is changed.<sup>h</sup> In Equity however time is not “of the essence of a contract,” unless the intention of the parties that it shall be so is clear beyond a doubt; delay by one of them therefore does not empower the other to rescind the contract.<sup>i</sup> But either party can, by giving the other notice that if the contract is not performed within a specified time (which must be reasonable), it will be deemed at an end, make time of the essence of the contract, and rescind it in case of further delay.<sup>k</sup>

3. A person in delay being a wrong doer, the maxim *omnia præsumentur contra spoliatorem* is applicable to him.<sup>l</sup>

<sup>a</sup> Co. Lit. 208; 2 M. & S. 50.

<sup>b</sup> Co. Lit. 208; Com. Dig. Cond. (G. 3 & 4).

<sup>c</sup> Com. Dig. Cond. (L. 7 to L. 11); *Birks v. Trippet*, 1 Wms. Saund. 32.

<sup>d</sup> 2 Fonbl. Eq. 432; *Arnott v. Redfern*, 3 Bing. 353; *Craven v. Tickle*, 1 Ves. J. 63; but see the note to § 121, *post*.

<sup>e</sup> See *Craven v. Tickle*, 1 Ves. J. 63. See the note to § 121, *post*.

<sup>f</sup> *Fennings v. Humphrey*, 4 Beav. 1.

<sup>g</sup> 12 Ves. 333; Sug. Vend. & Pur. chap. 5. § 1.

<sup>h</sup> *Martindale v. Smith*, 1 Q. B. 395.

<sup>i</sup> *Raddiffe v. Warrington*, 12 Ves. 326; *Roberts v. Berry*, 3 De G. Mc. & G. 284; *Parkin v. Thorold*, 16 Beav. 59.

<sup>k</sup> See 16 Beav. 71.

<sup>l</sup> See *Amory v. Delamirie*, 1 Smith L. C. 151.

4. He in whose favour rights arise from the delay of another may of course preclude himself by his own conduct from exercising them.<sup>a</sup> A refusal by him to accept performance discharges the other side from all the consequences of delay,<sup>b</sup> and, if performance is duly tendered at the proper time, discharges him from performance altogether.<sup>c</sup> But where payment of a sum of money can be actively enforced, tender and refusal does not wholly discharge the debtor.<sup>d</sup>

## NOTE TO § 100.

**Modus.**

## 1.

A condition is distinguished from what the Romans term *modus* mainly by its consequences. A condition imposes no obligation but affects the right to which it is annexed. In a case of *modus*, the modifications annexed to the right impose obligations capable of being enforced, but which, if not observed, do not affect the vesting or divesting of the right. Whether given words impose a condition (precedent or subsequent), or whether they merely impose independent obligations, is always determined by the intention of the utterer, but in case of doubt the presumption is in favour of a *modus* as being the least dis-advantageous. *Semper in obscuris quod minimum est sequimur.*<sup>e</sup> It is often moreover a very difficult question to determine, whether certain words merely express a wish on the part of the utterer or impose an obligation upon the person to whom they are addressed. In the latter case only is there any *modus*.<sup>f</sup>

## 2.

Although the term *modus* is to be found in English law books, it has the same meaning as condition,<sup>g</sup> and we do not appear to have any word precisely equivalent to *modus* in the sense in which it occurs in the writings of civilians.

## 3.

As to whether a given expression imposes a duty or merely amounts to a statement of a wish for the guidance of him to whom it is addressed, the

<sup>a</sup> *Hunt v. Silk*, 5 East, 449.

<sup>b</sup> Vin. Ab. *Tender* (O); *Dixon v. Clark*, 5 C. B. 365.

<sup>c</sup> Lit. § 335, 338; Co. Lit. 207 a; 9 Co. 79.

<sup>d</sup> See in addition to the authorities last cited, 1 Wms. Saund. 33 c; Co. Lit. 209 b *Dixon v. Clark*, 5 C. B. 365. Blackstone (3 Com. 303) treats non-discharge by tender and refusal as the rule, and discharge as the exception; but as by refusal performance of a contract, in the manner and form agreed, is in fact prevented, the above statement is, it is submitted, more correct.

<sup>e</sup> L. 9, de R. J. (50. 17.)

<sup>f</sup> See 3 Sav. System. § 128.

<sup>g</sup> Co. Lit. 201 a.

result of a great number of cases was stated by Lord Langdale to be that "when property is given absolutely to any person, and the same person is (by the giver who has power to command) recommended or entreated or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held a *trust*, 1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and 3. If the objects or persons intended to have the benefit of the recommendation or wish be also certain."<sup>a</sup> In cases of doubt the leaning is in favour of a moral obligation only.<sup>b</sup>

### Nominate, Innominate Contracts.

#### 4.

As a rule, mere assent was not, by the old civil law, sufficient to constitute a valid agreement. Something more was necessary, but there were four kinds of agreement which, without any formality, became binding if one of the parties performed his part. These four were *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (delivery for safe keeping), and *pignus* (delivery by way of pledge). They were termed *real* because some *thing* was delivered by one of the parties to the other, and *nominate* because each was by name allowed to be valid notwithstanding the above mentioned general rule. In the course of time however all other contracts, one party to which had performed his part, were held to be binding on and enforceable against the other, and were termed *innominate* to distinguish them from the four nominate contracts to which the principle was first applied.<sup>c</sup>

#### NOTE TO § 102.

#### Monsters.

The English law regarding monsters is adopted from the Roman, and is similar to it. See Fleta, lib. 1. c. 5; Co. Lit. 7 *b*. The birth of a monster does not entitle a husband to curtesy. Co. Lit. 29 *b*. A contract for the division of money to arise from the exhibition of a monster was held illegal in the time of Charles II. *Herring v. Walround*, 2 Ch. Ca. 110.

#### NOTE TO § 103.

#### Persons unborn.

By our law, the existence of a child before birth is so far recognised, that proceedings may be taken on behalf of an infant *en ventre sa mère*, for the protection of the rights which it will by birth acquire;<sup>d</sup> and wherever it is

<sup>a</sup> *Knight v. Knight*, 3 Beav. 172; and see *Briggs v. Penny*, 3 Mac. & Gor. 546.

<sup>b</sup> *Ibid*.

<sup>c</sup> Thib. Syst. § 392.

<sup>d</sup> 2 Atk. 117; 1 Ves. S. 86, 555; 2 Vern. 710.

for its benefit, a child is deemed to have been in existence from the time of its conception.<sup>a</sup> Indeed it would seem that marriage settlements cannot be revoked even before marriage, if thereby the children suffer.<sup>b</sup>

## NOTE TO § 105.

**Proof of life and death.**

The onus of proving birth or death is upon him who asserts the fact, conformably to the rule, that a state of circumstances once appearing to exist, is presumed to continue until some reason to the contrary can be shown.<sup>c</sup> Nevertheless, the deaths of persons, upon whose lives interests in property depend, being liable to be concealed to the prejudice of those next entitled, the latter are, by statute, empowered to call for evidence of the continued existence of the former, if their death and its concealment are believed.<sup>d</sup>

In the absence of any direct evidence of death, a person who has gone abroad, or has left his usual places of resort, and who, enquiry being made in likely places, has not been heard of for seven years, is presumed to be dead.<sup>e</sup> But he is not presumed to have died at any particular moment,<sup>f</sup> and where there is no unexplained absence and no fruitless search, the shortest time after the lapse of which a person will be supposed dead, does not seem fixed.<sup>g</sup>

Where several persons perish together, and it is not known which perished first, if from the age and strength of the parties or other circumstances, no reasonable supposition can be made,<sup>h</sup> no one is presumed to have died before the other.<sup>i</sup>

## NOTE TO § 108.

**One person with several rights.**

## 1.

The statement in the text (Nr. 2), as to several rights whereof one only can be exercised, does not, and is not intended to apply to cases of alternative duties. See the law cited in the note (m) p. 103.

<sup>a</sup> *Doe v. Clark*, 2 H. Black. 399; *Doe v. Lancash.* 5 T. R. 49; *Beale v. Beale*, 1 P. W. 244; *Millar v. Turner*, 1 Ves. § 85; *Palmer v. Cracroft*, 2 Vern. 578. As to back rents, see 8 Wils. 526.

<sup>b</sup> See *Page v. Horne*, 9 Beav. 570, and 11 ib. 227; *Mc Donnell v. Heslridge*, 16 Beav. 346.

<sup>c</sup> Best on Presumptions, 186; *Wilson v. Hodges*, 2 East, 312.

<sup>d</sup> 6 Anne, c. 18.

<sup>e</sup> Best on Pres. 190, 191; *re Creed*, 1 Drew. 235, as to enquiry.

<sup>f</sup> Best *ib.* 191; 1 Tay. Ev. 128.

<sup>g</sup> 1 Tay. Ev. 126; Best, *sup.* 190.

<sup>h</sup> *Broughton v. Randall*, Cro. El. 503; *Sillick v. Booth*, 1 Y. & C. 117.

<sup>i</sup> Best on Presumptions, 193—201, where all the cases will be found.

## 2.

Where a person fills several characters he is regarded as a different person in respect of each character, or to be *Homo qui plures sustinet personas*. This principle is recognised by English writers, who express it by the maxim, *Quum duo jura in una persona concurrunt, æquum est ac si essent in diversis*.<sup>a</sup> No person of course can ever be allowed to protect himself from the consequences of his own wrongful act, or to take any advantage of his own wrong, by insisting that what he did in one capacity cannot affect him in another; for the object of the rule is to prevent injustice to a person filling more characters than one, but not to afford him the means of inflicting injustice on others.

## NOTE TO § 111.

**Communio.**

In ordinary partnerships the majority have, by the law of England, the right to govern in all matters clearly within the scope of the partnership business; and the maxim of the Roman law *in re communi potior est causa prohibentis* is not applied.<sup>b</sup> But the maxim always holds where an attempt is made to alter the constitution of the partnership or to change the nature of its business; in such a case no individual is bound by what the others may do, but only by his own conduct.<sup>c</sup> This principle is especially important in joint-stock companies, &c.

As regards ships, the majority in value of part-owners can employ the ship on any reasonable voyage they like, provided they give proper security to the dissentient minority, to indemnify them against loss;<sup>d</sup> and, on the other hand, if the majority refuse to employ the ship at all, the minority can, it is said, upon giving like security, insist upon employing her themselves.<sup>e</sup>

The rule stated in the text, that a *communio* may be dissolved at the will of any member, has been adopted in this country with respect to ordinary partnerships;<sup>f</sup> but by the English law a person can deprive himself of this right, for it seems clear that if a partnership is entered into for a specified time, no individual member can capriciously dissolve it before the expiration of that time;<sup>g</sup> nevertheless the gross misconduct of one of the partners, or

<sup>a</sup> 2 P. W. 295; *Wall v. Tomlinson*, 16 Ves. 413; *Brown v. Gordon*, 16 Beav. 302; 2 Prest. Abs. 450.

<sup>b</sup> Story on Partnp. § 124-5.

<sup>c</sup> See *Davies v. Hawkins*, 3 M. & S. 488; *Morgan's ca.* 1 Mc & G. 235, 240.

<sup>d</sup> Abbott on Shipping, p. 80.

<sup>e</sup> See Story on Partnp. § 427, note.

<sup>f</sup> Story on Partnp. § 269; *Peacock v. Peacock*, 16 Ves. 49.

<sup>g</sup> Story, *loc. cit.* § 275.

other special circumstances will induce a court of Equity to dissolve such a partnership.<sup>a</sup>

## NOTE TO § 112.

**Corporations.**

On the law of corporations the reader is referred to Mr. Grant's Treatise on the Law of Corporations, in which everything relating to them will be found. The leading case upon the subject is *The case of Sutton's Hospital*, 10 Co. 23 a.

**Sorts of.**—In English law-books corporations are divided into aggregate and sole, (but with the exception of their incapacity to acquire land) the only character common to both seems to be that of continued existence, and even here there is a distinction, for a corporation aggregate has, properly speaking, no successors, but continues as one unaltered person from its creation to its extinction,<sup>b</sup> whilst a corporation sole, properly speaking, has successors, the mention of whom is necessary, in order that they may succeed to rights or duties conferred or imposed upon the present representative of the corporation.<sup>c</sup> Moreover, as a rule, a chattel will not go to the successors of a corporation sole, even if they are named.<sup>d</sup>

## NOTE TO § 113.

## 1.

**Existence.**—A corporation cannot be created by private individuals without the authority of the Legislature or the Crown.<sup>e</sup> Such authority may be presumed from lapse of time,<sup>f</sup> and may be given by implication.<sup>g</sup>

Foreign corporations are recognised,<sup>h</sup> and if they have a business office here, they are deemed within the jurisdiction of our courts.<sup>i</sup>

## 2.

**Members.**—The proviso in the text as to the admission into one corporation of the members of another is in practice never observed, and indeed, the restriction is altogether denied by some persons. [Braun, § 219.]

## NOTE TO § 114.

## 1.

**Bye-Laws.**—Every corporation aggregate has, as a matter of course, power

<sup>a</sup> Smith's Merc. Law, 25, 26.

<sup>b</sup> See 10 Co. 32 b : 5 De G. & Sm. 147.

<sup>c</sup> Co. Lit. 8 b.

<sup>d</sup> Co. Lit. 9 a.

<sup>e</sup> Com. Dig. *Franchise*, (F. 1.)—(F. 5.)

<sup>f</sup> *Ibid.* (F. 4.)

<sup>g</sup> *Ibid.* (F. 6) : *Conservators of the river Tone v. Ash*, 10 B. & C. 349; *Newport Marsh trustees*, 16 Sim. 346.

<sup>h</sup> *The National Bank of St. Charles v. Bernales*, 1 C. & P. 569.

<sup>i</sup> *Maclaren v. Stainton*, 16 Beav. 279.

to make laws for the regulation of its internal affairs, and for the government of its own members.<sup>a</sup> But, in the absence of statutory authority to that effect, no corporation can make a law binding upon strangers.<sup>b</sup> From immemorial custom, however, such authority will be presumed.<sup>c</sup>

As to what bye-laws are valid and what not, see Grant on Corporations, p. 76 *et seq.*

## 2.

**Majority.**—The Roman maxim *in re communi potior est contradicentis conditio* (note to § 111) is applicable only to ordinary partnerships, and cases of private property. It has no application to a body corporate which is created by the state for the attainment of important ends, and which would be a machine entirely useless if unanimity amongst its members were in every case requisite before anything could be done. [Braun Erör. § 220.] See as to the powers of a majority, Grant on Corporations, p. 68; *Att. Gen. v. Davy*, 2 Atk. 212.

## NOTE TO § 115.

**Nature.**—Of all the legal principles relating to corporations, undoubtedly the most important is that so well expressed by Ulpian, *Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent*.<sup>d</sup>

A corporation aggregate is a juridical person distinct from its individual members,<sup>e</sup> and consequently a member may sue or be sued by a corporation,<sup>f</sup> may grant to or take from it,<sup>g</sup> but cannot enforce its rights, or be made answerable for its liabilities.<sup>h</sup>

Unless it be held that a corporation, being a fictitious person created for a particular purpose, has a fictitious will solely to enable it to carry out the objects for the attainment of which it exists, unless, that is, it be held that a corporation can do no wrong, it seems difficult to maintain upon principle that a corporation cannot commit a tort,<sup>i</sup> or even a crime. A corporation

<sup>a</sup> Com. Dig. *By-Law* (A).

<sup>b</sup> *Ibid.* (C. 2.).

<sup>c</sup> *Ibid.*

<sup>d</sup> L. 7. § 1. *Quod cujusque* (3. 4.).

<sup>e</sup> See 2 Beav. 567.

<sup>f</sup> *A. G. v. Wilson*, Cr. & Ph. 1: *Dunstan v. The Imperial Gas Co.*, 3 B. & Ad. 132, *per* Parke, J. Grant on Corp. 72.

<sup>g</sup> Prest. Shep. Touch. 233. The head of a corporation aggregate is said to form an exception, *ibid.*; Vin. Ab. Corp. (G. 3.) pl. 10.

<sup>h</sup> 1 Add. Con. 160, 161.

<sup>i</sup> It is settled that trespass lies against a corporation. *The Eastern Counties' Rail. v. Broom*, 15 Jur. 297; so *trover Yarborough v. The Bank of England*, 16 East, 6. As to an action for malicious prosecution, see *Stevens v. The Midland Counties' Rail Co.* 18 Jur. 932.

cannot indeed be punished as an ordinary person can be punished, and for the protection of society such of the members of a corporation as are, in fact, privy to the commission of a crime in the corporate name, may well be deprived of the protection which, in matters of less importance, the corporate character affords them.<sup>a</sup>

## 2.

**Name.**—The name of a corporation being the only means whereby it is individualised, on every change of name there is, in strictness, a new corporation; but, nevertheless, the rights and duties of a corporation are not extinguished by a change of name, but are enforceable by and against it in its new name.<sup>b</sup>

## 3.

**Common Seal.**—The will of a corporation aggregate is evidenced by its common seal, and, with some few exceptions, not otherwise.<sup>c</sup> The important consequence of this is, that a corporation cannot be sued, either at law or in equity, upon any contract to which the common seal is not appended.<sup>d</sup> Nevertheless a court of Equity will not allow a corporation, which has actually received the benefit of a contract, to evade performance on its part merely because the contract was not duly sealed.<sup>e</sup> At law it has however frequently been held that performance on the other side is not sufficient ground for dispensing with the seal.<sup>f</sup> But even at law the common seal is not required duly to authorise acts of a trifling nature or of frequent occurrence, and necessary to the carrying on of the business of the corporation.<sup>g</sup>

## NOTE TO § 116.

**Directors.**—The law relating to corporate officers generally will be found fully stated in Mr. Grant's treatise already cited.

As regards the directors of associations of individuals, the following are the most important principles to be borne in mind:—

1. Directors stand in a fiduciary relation to the shareholders, and are bound to do the best in their power for them.<sup>h</sup>
2. The authority of the directors is not absolute, but is restricted by the

<sup>a</sup> As in *Harman v. Tappenden*, 1 East, 555. See *Salmon v. The Hamburg Co.* 1 Ch. Ca. 204.

<sup>b</sup> Com. Dig. *Franchise*, (F. 9); 1 Wms. Saund. 339 a, 344; 4 Co. 87 b; 1 Prest. Ab. 273-4; *The Mayor of Colchester v. Seaber*, 3 Burr. 1866.

<sup>c</sup> Grant on Corp. 55.

<sup>d</sup> *Diggle v. The Blackwall Railway Co.*, 5 Ex. 442; *Goody v. The Colchester Rail. Co.*, 17 Beav. 132.

<sup>e</sup> *Edwards v. The Grand Junct. Rail. Co.* 1 M. & C. 650; see too, Cr. & Ph. 63.

<sup>f</sup> *Diggle v. Blackwall Rail. Co.*, 5 Ex. 442, and the cases there cited.

<sup>g</sup> Com. Dig. *Franchise* (F. 13); *Clark v. Cuckfield Union*, 16 Jur. 686.

See per Romilly, M. R., 17 Beav. 98.



nature of the business to transact which the company exists, and by the terms of the instrument constituting the company. Within the limits so fixed the directors are the agents of the company, but beyond those limits there is no agency, and the directors must personally take the consequences of their own acts.<sup>a</sup>

3. Even a majority of the company cannot, as against a non-assenting member, extend the authority of the directors when once fixed as above.<sup>b</sup>

4. The fact that the company has derived benefit from the conduct of its directors is not *per se* a ratification of such conduct, and equivalent to a previous authorisation.<sup>c</sup>

5. The doctrines which hold as between third parties on the one hand, and the directors and the company on the other, do not necessarily hold as between the directors on the one hand and the company on the other. The considerations in these two cases are often very different, but to go into those differences would be here impertinent.

#### NOTE TO § 117 A.

#### Joint Rights, &c.

##### 1.

The word *correus* or *conreus* occurs but once in the corpus juris, namely in D. XXXIV. tit. 3 (de lib. legata) l. 3. § 3.

It will be observed that an *obligatio in solidum* is single as regards its object, but multiple as regards its subjects; one act only has to be done, but it has to be done by or to several, or one at least of several persons. From this it logically follows that whatever is a cause for annulling or dissolving the relationship by affecting its object (*in rem*), annuls or dissolves the relationship as regards all the persons between whom it subsisted; whereas those causes which only relate to this or that person produce no effect on the relationship, except as regards him.<sup>d</sup>

With respect to what the author denotes by the phrase, *in solidum in a narrow sense*, it is to be observed that a correal relationship exists only when the right or the duty of persons entitled or obliged respectively is identical, (*una obligatio duo rei ejusdem obligationis*), and also that it arises from a single or a simultaneously combined expression of will; as for example in cases of a stipulation, where several creditors at the same time ask for and receive one answer from a debtor, or where several persons together return one answer to a

<sup>a</sup> See *Hallett v. Dowdall*, 16 Jur. 462; *Worcester Corn Exchange Co.* 3 De G. Mc. & G. 180; *Smith v. Hull Glass Co.* 8 C. B. 668; 11 *ib.* 897, and the cases there cited.

<sup>b</sup> *The Vale of Neath, &c. Co.* 17 Jur. 813.

<sup>c</sup> See *The Worcester Corn Exchange Co. ub. sup.*

<sup>d</sup> 2 Ortolan Instit. 150. So with us, the bankruptcy of one of several persons jointly obliged does not discharge the others. *Crosse v. Smith*, 7 East, p. 256; 12 & 13 Vic. c. 106, § 200.

question put to them (*pr. Inst. de duob. reis* 3. 16); and again where several persons are charged with the payment of a legacy. As regards the true *correi* it was formerly a rule that if an action was brought by or against one of several *correi credendi* or *debendi* and *litis contestatio* followed, a new *obligatio* arose as between the plaintiff and the defendant, which put an end to the correal relationship previously existing, and thus extinguished the rights and duties of the other *correi* (Gaius, III. 180, 181, IV. 106—108). This harsh principle extended also to sureties for they were considered *correi* of the principal debtor (L. 28. § 1; L. 42. § 1 *de jurejur.* 12. 2), but it was wholly abolished as regards *correi promittendi* by Justinian in L. 28. Cod. *de fidei Juss.* (8. 41).

A relationship *in solidum*, not strictly correal (*alia atque alia obligatio*), arises, where from independent and distinct grounds there is one right of action exercisable by or against several individuals, but so nevertheless that satisfaction by or to one of them is a satisfaction by or to all. In such cases, even by the old law, *litis contestatio* (which is no satisfaction) did not affect the other persons interested.<sup>a</sup>

## 2.

The nature of a joint or joint and several right and duty is such, that although it resides in several persons, performance, or its equivalent, (e.g. a release) to or by one of them, puts an end to the whole right or duty as to all.<sup>b</sup> But where several persons join in a transaction solely in order that each may be a check on the other, payment to one of them does not alone discharge their joint debtor; e.g. where several persons, not being partners, make a joint deposit in a bank,<sup>c</sup> or where several persons are co-trustees.<sup>d</sup>

The next most important characteristic of a joint right or duty is, that upon the death of one of the persons in whom the right or duty is vested, the *whole* right or duty devolves upon the survivors, to the exclusion of the representatives of the deceased.<sup>e</sup> This rule is not, however, either at law or in equity, of universal application; for—

A. Both at law and in equity, it is held that,

a. A bare trust or authority does not survive.<sup>f</sup>

b. *Jus accrescendi inter mercatores locum non habet.*<sup>g</sup>

<sup>a</sup> See Froben, § 135, and 3 Vang. Leif. § 573.

<sup>b</sup> Prest. Sh. Touch. 71, 335, 337; Co. Lit. 232 a; *Cheetham v. Ward*, 1 Bos. & Pul. 633; *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645; 2 Add. Con. 1233. As to bankruptcy, see note d on the last page.

<sup>c</sup> *Innes v. Stephenson*, 1 Moo. & Rob. 145.

<sup>d</sup> See 11 Ves. 325; 2 Swanst. 64. But at law, see *Husband v. Davis*, 10 C. B. 645.

<sup>e</sup> Com. Dig. Estates (K 3); Co. Lit. 180 b; Lit. § 280—2; *Anderson v. Martindale*, 1 East, 498; *Richards v. Heather*, 1 B. & A. 29.

<sup>f</sup> Co. Lit. 181 b.

<sup>g</sup> Broom's Max. 343; *Buckley v. Barber*, 6 Ex. 164; *Jeffereys v. Small*, 1 Vern. 217.

B. In Equity, though not at law, where a joint obligation arises from an advance of money to several, even if a security in *joint* terms be given for its repayment, the survivors are not alone answerable for the whole debt.<sup>a</sup> Again where a right is purchased by several, and each of them advances his own money for the same, upon the death of one, the whole of that right does not pass to the survivors.<sup>b</sup>

An obligation that is not only joint, but also several, is, until performance, (or extinction by other means), enforceable against all the persons obliged, or against any one of them; and on the death of one, his several liability devolves on his representatives.<sup>c</sup>

NOTE TO § 117 B.

**Their Creation.**—Joint rights and duties arise principally by—

Agreements,<sup>d</sup> including transfers of property.<sup>e</sup>

Testamentary disposition.<sup>f</sup>

Unilateral unpermitted acts, wherein several are concerned together;<sup>g</sup> but the liability in this case is also several,<sup>h</sup> unless it arises in respect of land held jointly.<sup>i</sup>

NOTE TO § 117 C.

**Remedies.**—When several persons are jointly entitled, each of them has a right which is limited by the equal rights of the others, and consequently no one can exclude another from the enjoyment of the object of the common right. Where however that object is a chattel, whoever *is* in possession of it has a right to continue so.<sup>k</sup> As regards the remedies which persons jointly entitled have against each other—

1. In case of the destruction of, or other injury to the thing held jointly, an action at law for damages will lie.<sup>l</sup>

2. In case of actual exclusion from the enjoyment of land ejectment will lie.<sup>m</sup>

<sup>a</sup> *Bishop v. Church*, 2 Ves. S. 100, 371; *Sleech's ca.*, 1 Mer. 539.

<sup>b</sup> *Lake v. Craddock*, 3 P. W. 158; 1 Wh. & Tud. L. C. 120.

<sup>c</sup> 1 Wms. Saund. 154 a; *Enys v. Donnithorne*, 2 Burr. 1190. As to joint and several rights, see *Slingsby's ca.* 5 Co. 18 b; 1 East, 501.

<sup>d</sup> See 1 Wms. Saund. 155 a, note c; *Hopkinson v. Lee*, 6 Q. B. 964; *Keightley v. Watson*, 3 Ex. 716.

<sup>e</sup> See Co. Lit. 180 a.

<sup>f</sup> 9 Ves. 204; Com. Dig. *Estate by devise* (N. 8.).

<sup>g</sup> Lit. § 278.

<sup>h</sup> Co. Lit. 232 a; 1 Wms. Saund. 291 f.

<sup>i</sup> 1 Wms. Saund. 291 g.

<sup>k</sup> Co. Lit. 200 a; 2 Wms. Saund. 47 o; *Foster v. Crabb*, 12 C. B. 136. As to ships, see *ante* p. lxx.

<sup>l</sup> 1 Chitty Plead. 89.

<sup>m</sup> *Doe v. Bird*, 11 East, 49.

3. In other cases the remedies are mainly equitable; for, except where by statute<sup>a</sup> an action of account will lie, one person jointly entitled with another cannot sue him at law for any matter affecting their joint right.<sup>b</sup> The usual remedy where one of several persons jointly entitled is prevented from duly enjoying his right, is, by a bill in Equity for an account, and, if necessary, for a dissolution of the joint relationship.<sup>c</sup>

It is clear that at law all the persons in whom a right is vested jointly must join in any action which it may be necessary to bring in respect of it, and there are very few exceptions to the rule;<sup>d</sup> no one of them, therefore, can (at all events against the consent of the others) compel performance to himself alone of the duty correlative to the joint right;<sup>e</sup> although performance if made to one is a good discharge as against all.<sup>f</sup>

A debt due from one of several persons jointly entitled cannot, in an action by them, be set off against their joint demand;<sup>g</sup> but the joint demand may be extinguished by such a set off, if it has actually been made before action.<sup>h</sup>

## NOTE TO § 117 D.

## 1.

The Nov. 99, upon which the practice stated in the text and disapproved by the author is mainly based, has been shown by Douellus, and still more clearly by Asverus to be applicable solely to *correi* who had become sureties for each other, and for whom, consequently, as sureties, the *exceptio divisionis* is available. [Froben, § 138.]

## 2.

The statement in the text that, if a correal debtor pays the whole debt, he cannot, in the absence of special grounds, claim contribution from his co-debtors, is contrary to the opinion of many writers, but rests upon the principle that each *correus debendi* is himself liable to pay the whole debt; that when he pays the whole, he does nothing more than perform an obligation which is his own; and that a person who merely does his own duty has, in the absence of special grounds, no claim against another who is thereby incidentally benefited. [Froben, § 138.]

<sup>a</sup> 4 Anne, c. 16; *Beer v. Beer*, 12 C. B. 60.

<sup>b</sup> 1 Chitty Pl. 45; *Thomas v. Thomas*, 5 Ex. 28.

<sup>c</sup> Com. Dig. *Chancery* (3 V. 6); Story's Eq. Jur. § 466. The old writ of partition is no longer available, 3 & 4 Wm. IV. c. 27, § 36.

<sup>d</sup> 1 Chitty Pl. 13, 14, 73, 74.

<sup>e</sup> *Atwood v. Ernest*, 13 C. B. 881.

<sup>f</sup> *Husband v. Davis*, 10 C. B. 645.

<sup>g</sup> 2 Add. Con. 1315.

<sup>h</sup> *Wallace v. Kelsall*, 7 M. & W. 264.

## 3.

**Contribution.**—As regards persons jointly obliged, although each is responsible *in solidum* to the person in whom the correlative right resides, still *inter se* no one is under any obligation to free the others from performance altogether. Hence arise the doctrines that

1. If less than all of the persons jointly, and not also severally, obliged are sued at law, a plea in abatement may be put in with a view to compel the plaintiff to make them all defendants.<sup>a</sup>

2. If one of several persons jointly, or jointly and severally, obliged is compelled to perform the whole obligation, he can compel the others to contribute either by an action at law,<sup>b</sup> or a bill in equity.<sup>c</sup> But, as a rule, neither at law nor in equity can one person compel another to bear any proportion of the consequences arising from their common *tort*.<sup>d</sup>

## NOTE TO § 119.

**Sex.**

The English law as to hermaphrodites is like the Roman, and is evidently taken from it, see Bracton 5 *a.*, Co. Lit. 8 *a.*

## NOTE TO § 121.

**Age.**

## 1.

The following tabular view of the contents of this section may be useful for reference.

Personæ	{	minores under 25	{	impuberes	{	infantes under 7
				boys under 14 girls " 12 ætas prima v. pupillaris		infantia majores { infantia proximi 7 and over { pubertati proximi
				puberes <sup>c</sup>	{	in pubertate minus plena.
				boys 14 and over girls 12 ætas secunda		boys between 14 and 18 girls " 12 " 14
{	majores 25 and over	{	{	majores 25 to 70	{	in pubertate plena.
				senectutes 70 and over		boys between 18 and 25 girls " 14 " 25

<sup>a</sup> Com. Dig. *Abatement* (F. 4)—(F. 8, a).

<sup>b</sup> 1 Wms. Saund. 264 *c*; F. N. B. 161 B.; *Prior v. Hembrow*, 8 M. & W. 873; 1 Smith L. C. 71 *a*, *et seq.*; *Cross v. Cheshire*, 7 Ex. 43; *Batard v. Hawes*, 2 E. & B. 287.

<sup>c</sup> 1 Story Eq. Jur., §§ 492, 504, 505; *Rogers v. Mackenzie*, 4 Ves. 752; *Craythorne v. Swinburne*, 14 Ves. 159.

<sup>d</sup> *Merryweather v. Nizan*, 2 Sm. L. C. 297; 1 *ib.* 71 *b*, *et seq.*; 1 Ves. & B. 117; Cr. & Ph. 28.

<sup>e</sup> Also called *minores*, *adulti*, *adolescentes*.

## 2.

As to the ages of infants, see 1 Black. Com. 463; Lit. § 104, and Coke's Com. in loc.

## NOTE TO § 122.

## Health.

Unsoundness of body does not appear to affect the rights of a person, save that impotence is a cause for divorce,<sup>a</sup> and leprosy renders the sufferer liable to be confined,<sup>b</sup> and disables him from suing except by attorney.<sup>c</sup>

Unsoundness of mind is juridically speaking far more important and greatly affects the capacity of the sufferer to acquire rights and incur obligations. Persons of unsound mind are termed generally *non compotes mentis*, and are of several sorts as will be seen by referring to Coke upon Littleton, 247a.

The main points which require observation here are that unsoundness of mind excludes that exercise of will in the absence of which there can be no crime,<sup>d</sup> and also excludes that assent which is indispensable in order that an obligation may arise from a juridically permitted act.<sup>e</sup> For an unpermitted, but not criminal, act a person of unsound mind must answer in damages,<sup>f</sup> and he is even answerable *ex contractu* for necessities actually supplied, and he cannot rescind transactions entered into with persons who had no reason to suspect, and were not aware of the existing unsoundness.<sup>g</sup> An act done during a lucid interval is clearly valid.<sup>h</sup> The old doctrine that a person of unsound mind cannot stultify himself,<sup>i</sup> i.e. avoid the consequences of his own permitted acts by setting up as a defence his unsoundness of mind, may be considered as now exploded.<sup>k</sup>

Drunkenness affords no excuse for the commission of an unpermitted act whether of a criminal nature or not,<sup>l</sup> but is a ground of defence to actions

<sup>a</sup> 17 Jur. 628.

<sup>b</sup> F. N. B. 234.

<sup>c</sup> Co. Lit. 135 b.

<sup>d</sup> 4 Co. 124.

<sup>e</sup> Com. Dig. *Idiot* (I. 1.)

<sup>f</sup> Vin. Ab. *Lunatic* (G).

<sup>g</sup> *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170; *Read v. Legard*, 6 Ex. 637; *Beavan v. Mc Donnell*, 9 Ex. 309; *Niell v. Morley*, 9 Ves. 478.

<sup>h</sup> *Hall v. Warren*, 9 Ves. 605.

<sup>i</sup> Lit. § 405, 406, and Coke's Com. thereon.

<sup>k</sup> F. N. B. 202; 2 Black. Com. 291, 292; 1 Fonb. Eq. 48 *et seq.*; *Yates v. Boen*, Str. 1104; *Faulder v. Silk*, 3 Camp. 126; *Gore v. Gibson*, 13 M. & W. 623, and the note to it in 9 Jur. 142.

<sup>l</sup> Bac. Law tr. 58; 4 Black. Com. 25, 26; Plow. 19. But see *R. v. Moore*, 16 Jur. 750, and the note there, and also the note in 9 Jur. 142.

or suits founded on permitted acts performed by the defendant when so drunk as not to know what he was about.<sup>a</sup>

#### NOTE TO § 123.

##### Relationship.

Taking the word *cognatio* in its most general signification of relationship, otherwise than by marriage, we have—

cognatio	{	naturalis.
		civilis, or agnatio.
		spiritualis.

The first, or relationship by blood, is easily intelligible and requires no further notice.

The third was wholly unknown to Roman lawyers, and is a senseless fiction of which the reader will find an account in Pothier's *Traité du contrat de mariage* (Pt. III. C. 3, art. 4). See too 1 & 2 Ph. & Mary, c. 8.

The second was highly important amongst the Romans and requires explanation. It is founded upon the *Patria Potestas*, by virtue of which agnation subsists between—

1. Those who are or have been subject to the same *patria potestas*.
2. Those who would be so subject if the common tie were still alive.

Blood relations may of course be agnates, but so also may persons who are not related by blood, e.g. adopted persons, and those who are under the *patria potestas* of the adopter.<sup>b</sup>

By *Patria Potestas* is meant "the power which a Roman father had over the person of his children, grandchildren and other descendants (*filii-familias, filiae-familias*), and generally all the rights which he had by virtue of his paternity. The foundation of the *Patria Potestas* was a legal marriage and the birth of a child gave it full effect."<sup>c</sup>

#### NOTE TO § 127.

##### Degrees of Relationship.

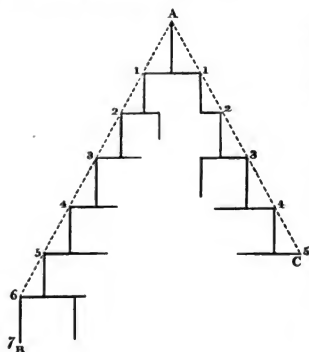
To illustrate the difference between the modes of computing relationship between collaterals according to the Roman and Canon Law, suppose in the following diagram that A. is the common ancestor of B. and C., and that each

<sup>a</sup> *Gore v. Gibson*, 13 M. & W. 623; *Cooke v. Claycorth*, 18 Ves. 12. See generally as to drunkards an art. in 26 Law Mag. 392.

<sup>b</sup> See 1 Puchta's Vorlesungen, § 42.

<sup>c</sup> Dict. of Gr. and Rom. Antiq. art. *Pat. Pot.*, to which and to the article *Familia*, the reader is referred for further information on this subject.

of the numbers 1, 2, 3, &c., represents a descendant of A. Then the degree of relationship between



1. A. and B. or C. is, both by the Roman and Canon law, represented by the number of degrees in the lines AB or AC respectively, e. g. 7 or 5.

2. B. and C. is—by the *Roman law*, represented by the number of degrees in  $BA + AC$ , e. g. 12.

*Canon law*, represented by the number of degrees in BA or AC, according as B. or C. is the more remote from A., e. g. 7. Of course, if the number of degrees is the same in both lines, that number represents the degree of relationship between B. and C.

In ascertaining the next of kin of a person (for the purpose of granting letters of administration and distributing his personal property on his death intestate) the *Roman* mode of computation is adopted in England. See 1 Wms. Exors. 345.

#### NOTE TO § 128.

##### Affinity.

Marriage is what gives rise to affinity in the sense in which the Roman lawyers spoke of it. Affinity existed only between each of the married couple and the blood relations of the other. The blood relations of one were not the *affines* of those of the other.<sup>a</sup>

According to the Canon law, it is not marriage only, but cohabitation also that causes affinity. The main consequence of such affinity is to render marriage between *affines* unlawful.

#### NOTE TO § 129.

The Canonists recognised three kinds of affinity, viz., that existing between each of a married couple and his or her blood relations, and

1. The blood relations of the other.
2. The *affines* of the other.

<sup>a</sup> 1 Puchta Vorl. § 43.



3. The *affines* of the *affines* of the other.

To illustrate this—

1. My brother's wife is the *affinis* of myself, and, of course, of my brothers, sisters, &c. Here is affinity of the first kind.

2. If on the death of my brother, his widow (my sister-in-law) marries again, her husband becomes the *affinis* of myself. This is affinity of the second kind, there being no connection by blood between my sister-in-law and me.

3. If now my sister-in-law dies, and her second husband re-marries, his new wife becomes the *affinis* of myself. The affinity in this case is of the third kind, and subsists solely by virtue of the affinity between me and the husband of my deceased brother's wife, which again arose from the affinity existing between her and myself.

Previous to the holding of the third Council of Latran, affinity of the second and third kind was, as much as that of the first, an impediment to marriage; but at that council the Canon law was in this respect altered.<sup>a</sup>

NOTE TO § 130.

**Ignominy.**

Infamy of character is contracted by persons against whom judgment has been recorded in a prosecution for felony and certain other offences.<sup>b</sup> The consequences of this stigma upon the character were to render the person inadmissible, either as a juror or a witness;<sup>c</sup> but the disability to give evidence no longer exists.<sup>d</sup>

NOTE TO § 137.

**Object of a right.**

The author elsewhere<sup>e</sup> puts the substance of this section thus: "A right is nothing more than a possibility of acting. The *subject* of a right is that to which something is possible, and the *object* is that which is possible. The object of every right is consequently always an act or forbearance (*Handlung*), and it is clearly incorrect to say that persons and things are the objects of a right, they are rather mere objects of an *objecti iurium* or of transactions themselves (*Handlungen*)."

Here it may be as well to observe that no one word in English seems

<sup>a</sup> See Pothier Contrat de mariage, § 161.

<sup>b</sup> Co. Lit. 6 b, 158 a; Gilb. Ev. 126; Phillips & Amos Ev. 17; Com. Dig. *Testm. Witness*, (A 4).

<sup>c</sup> See the references in the last note.

<sup>d</sup> 6 & 7 Vic. c. 85.

<sup>e</sup> 2 Versuche, p. 3.

accurately to express the meaning of the German *Handlung*. It always denotes what is above described as the object of a right, and is best translated by act, transaction or event according to the context.

## NOTE TO § 138.

## 1.

**Impossible acts.**

The maxim *impossibilium nulla est obligatio* or *Impotentia excusat legem* or *Lex non cogit ad impossibilia* obtains in the English system of jurisprudence, and will be found illustrated in 1 Bl. Com. 91; Broom's Max. 181; 1 Co. 97 b, 98 a; Grounds and Rud. of the Law, p. 142, 193.

As to impossible conditions see *ante* p. lxi.

The above maxims do not relieve a person from making compensation for a breach, however unavoidable, of his express contract.<sup>a</sup>

## 2.

**Overt acts.**

Mere states of the mind do not fall within the province of jurisprudence. It is only when they result in an overt act that they are in any way cognizable by those who have to administer positive law.<sup>b</sup> The influence of motive and intention on lawful acts has been already alluded to (*ante* p. xxx), and it is only necessary further to observe in this place that intention, actual or presumed, is that which mainly determines whether an unlawful act amounts to a crime or not.

## NOTE TO § 140.

**Accidents.**

Accidents properly so called clearly do not, in the absence of a special contract or law, impose upon any one a liability to make good the damage which another may thereby have sustained.<sup>c</sup> But an occurrence which, although at first sight purely accidental, arose in fact from previous negligence, or breach of duty cannot of course be deemed non-imputable.<sup>d</sup>

For the principles by which courts of Equity are guided in affording relief in cases of accident the reader is referred to 1 Story Eq. Jur. c. 4.

<sup>a</sup> *Shubrick v. Salmond*, 3 Burr. 1637; *Parker v. Hodgson*, 3 M. & S. 267; *Tompson v. Miles*, 7. T. R. 384.

<sup>b</sup> See *R. v. Scofield*, Cald. 403; 2 East, 21: 4 Black. Com. 79, 86.

<sup>c</sup> 2 Wms. Saund. 421 a; *Aston v. Heaven*, 2 Esp. 533; *Wakeman v. Robinson*, 1 Bing. 213; *Crofts v. Waterhouse*, 3 Bing. 319; *Hall v. Fearnley*, 3 Q. B. 919.

<sup>d</sup> See the cases collected in Roscoe's Evidence, *Case for negligence*.

## NOTE TO §§ 141, 142.

**Negligence.**

*Culpa* denotes want of care, prudence or foresight, causing damage to another. There are as many degrees of *culpa* as there are of care, and in proportion as the latter is great is the former small.

I. An absolute standard for the estimation of the degrees of care is afforded—

1. By that of an ordinary person, having nothing peculiar in his constitution.

2. By that of a careful and prudent *Paterfamilias* (*diligentia*).

Less care than the first is not, juridically speaking, conceivable; the want of it amounts to the grossest negligence (*culpa lata*), and borders close on fraud (*dolo proxima*).

More care than the last cannot be reasonably expected of any man; the want of it shows very little negligence (*culpa levis* or *culpa* alone as opposed to *Dolus*), and the consequences are often scarcely without the limits of accident. A person answerable for *culpa levis* is answerable for all *culpa*.

Any other division of *culpa* has reference, not to its degree, but, to the nature of the conduct required to avoid it. One such division is called *custodia*, i.e. the duty to protect a thing from harm; a person in whom such duty resides is bound to diligence, but to diligence *in custodiendo*.

II. Another mode of estimating *culpa* occurs, where, instead of the absolute standards mentioned above, the care which the person in question usually takes of his own affairs is referred to as a measure. The want of such care may amount to *culpa lata* if bad intention be suspected, but otherwise it is considered as a want of diligence, and is only *culpa levis* (relative as opposed to the want of absolute diligence). [Puchta Pand. § 266.]

## NOTE TO § 143.

**Culpa lata, levis, &c.**—*Culpa lata est nimia negligentia, id est non intelligere quod omnes intelligunt.* (D. L. tit. 16 de V. S. L. 213, § 2, and see ib. L. 223 pr.)

*Culpa levissima* occurs once, and only once, in the Digest, viz. in (D. IX. tit. 2 ad leg. Aq. L. 44) *In lege Aquilia et levissima culpa venit.* But in this passage *levissima* is not contrasted with *levis* or *lata* and, as is well known, a superlative, not used by way of contrast, does not in Latin convey a superlative signification.

The division of *culpa* into *lata*, *levis* and *levissima* is wholly unwarranted by the Roman writers and is, moreover, insensible. It is indeed said that there is *culpa lata* when one does not that which even an imprudent person would have done, *levis* when one does not what a *diligens*, and *levissima*

when one does not what a *diligentissimus* pater familias would have done; and moreover, it is said that where a person derives the whole benefit of a thing (e. g. a gratuitous borrower) he is answerable for *culpa levissima*, that he who derives no benefit (e. g. a depositor) is answerable only for *culpa lata*, and that in transactions advantageous to both parties each is answerable for *culpa lata* and *levis*, but not for *culpa levissima*.

Those who, like Donellus, admit only two kinds of *culpa*, viz., *lata* and *levis*, which last includes the so-called *levissima*, maintain that he who does not benefit by a transaction and who is so far a free giver, is only answerable for *dolus* and *culpa lata*, whereas he who alone, or together with the other party to the transaction, derives a benefit from it, is answerable both for *culpa lata* and *culpa levis*. It is easily intelligible that the Romans should hold that a free giver should, out of mere gratitude, be held irresponsible for *culpa levis*, but it is not easy to see why one who himself derives a *quid pro quo*, and to whom no gratitude is due, should be held not liable for *culpa levissima*, or should receive *carte blanche* to any extent. The passages cited in the text are all against the trichotomous and in favour of the dichotomous division of *culpa*, and the only law in which *culpa levissima* is spoken of is not, for the reason already given, any exception to this assertion. [Froben, § 164.]

#### NOTE TO § 144.

**Its Measure.**—The measure of imputable negligence is a person's duty to take care.<sup>a</sup> Where a person is not bound to take any care, he cannot, juridically speaking, be guilty of any neglect. For the purpose of the present note, therefore, it will be sufficient to ascertain I. when a person is bound to take some care, and when he is not bound to take any; and II. the *degree* of care which is requisite wherever some must be taken.

I.—1. Every person, actively employed, is bound to take some care in what he is about. He cannot even exercise his own indisputable rights without taking some care not to cause others more damage than can in fairness be deemed necessarily incidental to such exercise: *Sic utere tuo ut alienum non ledas*.<sup>b</sup> Moreover, even a person who is gratuitously acting for another, is bound to take some care whilst so employed.<sup>c</sup>

2. Notwithstanding the universality of the duty to take some care, it is not every individual who, even if he suffers from the want of care, has a right to complain. A person may, by express contract, deprive himself of

<sup>a</sup> See 3 E. & B. 152, 168.

<sup>b</sup> See *ante* note 2 to § 58.

<sup>c</sup> See *Coggs v. Bernard*, 1 Sm. L. C. 82, and the note there.

his right to any care from another,<sup>a</sup> and no person can, by doing wrong, impose upon another a duty to take care of him.<sup>b</sup>

II. As regards the degree of care; wherever there is a duty to take any care, reasonable care is at once the most which can be demanded, and the least which is sufficient.<sup>c</sup> But the great difficulty still remains, viz., to determine what, under the circumstances of any particular case, is to be deemed reasonable care; and here the following distinctions must be taken.

1. Generally, and as between persons in no particular relation to each other, that alone is reasonable care which in the judgment of men in general is proportionate to the probability of injury to others; and consequently he who does what is more than ordinarily dangerous is bound to use more than ordinary care.<sup>d</sup> A person who does not take such care as is reasonable is answerable for the consequences, even at the suit of a person who, had *he* been more careful, might have avoided them;<sup>e</sup> but not at the suit of one whose own want of reasonable care contributed, as much as the want of such care on the other side, to the damage complained of, for then being *in pari delicto, melior est conditio defendentis*.<sup>f</sup>

2. As between persons who stand, by virtue of some transaction, in some peculiar relation to each other—

A. If the obligation to take care arises *ex contractu* or *quasi ex contractu*, the degree of care which is reasonable is that which the other side is under the circumstances reasonably justified in expecting;<sup>g</sup> and—

a. If the degree of care to be taken is expressly fixed by agreement, that degree of care alone, be it none or the greatest imaginable, is sufficient and can be required.<sup>h</sup>

b. If nothing be said as to the degree of care, then—inasmuch as one person is always justified in supposing that another will take at least such

<sup>a</sup> *Carr v. The Lanc. & Yorks. Railway Co.*, 17 Jur. 397, Ex.

<sup>b</sup> *Lygo v. Newbold*, 9 Ex. 302.

<sup>c</sup> See *Collett v. The L. & N. W. Railway Co.*, 15 Jur. 1053, Q. B.; *Dansey v. Richardson*, 3 E. & B. 144.

<sup>d</sup> See *The Europa*, 14 Jur. 627. This principle has not been always applied to Railway Companies, on the ground, it would seem, that where a dangerous trade, &c., is expressly sanctioned by a special law, the duty to take care is measured by that law; see 14 C. B. 225.

<sup>e</sup> *Barnes v. Ward*, 9 C. B. 392; *Rigby v. Hewitt*, 5 Ex. 240; *Davies v. Mann*, 10 M. & W. 546; *Lynch v. Nurdin*, 1 Q. B. 29.

<sup>f</sup> *Butterfield v. Forrester*, 11 East, 59; *Morrison v. The Gen. Steam Nav. Co.*, 8 Ex. 733; *Bridge v. The Grand Junc. Rail. Co.*, 3 M. & W. 244.

<sup>g</sup> See the judgments of Gould & Powell, JJ., in *Coggs v. Bernard*, 1 Sm. L. C. 82.

<sup>h</sup> *Coggs v. Bernard*, *ib. sup.*; *Austin v. The Manchester, Sheffield, & Lincolnshire Railway Co.*, 10 C. B. 454; *Carr v. The Lancashire & Yorkshire Railway Co.*, 17 Jur. 397, Ex.

care as persons of his condition in life, even if of less than ordinary prudence, usually take when engaged in their own affairs—

a. If the person to take care receives no benefit, he is answerable, but only answerable for the want of such care as that just mentioned, i. e., for *gross* negligence.

β. If, however, he alone derives a benefit, he must take more care than that; from him that amount of care alone is reasonable which a thoroughly prudent and careful man of his own condition would take in his own affairs; even for *slight* neglect such a one is therefore answerable.

γ. If there be a mutual benefit, e. g., reward on one side, and some advantage gained on the other, the degree of care which is reasonable lies between the two extremes above fixed; the person to take care is bound to take such care as a man of his condition in life and of ordinary prudence and thoughtfulness takes when engaged in his own affairs. Consequently, in such a case as that now supposed, a person is answerable, not indeed for *slight* neglect, but for *gross* neglect, and less than that.<sup>a</sup> But, on grounds of public policy, innkeepers and common carriers form an exception to this rule, their responsibility being much more extensive.<sup>b</sup>

To complete the above view, it is requisite to observe that a person who takes such care as *he* usually does of his own things may not take enough, even though he derives no benefit;<sup>c</sup> but if he were known to be a careless man, then it is otherwise, for it was the folly of the other side to trust him.<sup>d</sup> On the other hand, a person of more than ordinary skill, if circumstances arise in which an exercise of such skill is required, is not justified, even though unpaid, in exercising a less amount of it than the circumstances may be fairly said to demand.<sup>e</sup> Moreover, it must not be forgotten that, by our law, no person is, in the absence of all consideration, bound to *set about* what he may have promised to do, and consequently if his negligence consists solely in forbearing to enter upon the execution of his undertaking, such negligence is not legally imputable.<sup>f</sup> This doctrine, it must be confessed, well deserves the disapprobation which it has from time to time called forth.

B. An obligation to take care arises *ex delicto* or *quasi ex delicto* where a person assumes, without authority, to meddle with the things of another, or uses them in an unauthorised manner. If in such cases any damage ensues

\* The authorities supporting the above propositions will be found in *Jones on Bailments*, and *Coggs v. Bernard*, and the note thereto in 1 Sm. L. C. 82.

<sup>b</sup> See as to Innkeepers, *Culye's ca.*, 1 Sm. L. C. 37, and as to carriers, *Coggs v. Bernard*, *ubi supra*.

<sup>c</sup> *Doorman v. Jenkins*, 2 Ad. & Ell. 256.

<sup>d</sup> See *per* Lord Holt in *Coggs v. Bernard*.

<sup>e</sup> See *per* Lord Loughborough in *Schiells v. Blackburne*, 1 H. Bl. 158; *Wilson v. Brett*, 11 M. & W. 113.

<sup>f</sup> *Elsee v. Gatward*, 5 T. R. 143; *Balfe v. West*, 13 C. B. 466.

no amount of care which the person may show that he exercised is deemed reasonable; he is answerable at all events;<sup>a</sup> unless indeed he can show that the same consequences would have followed if he had been guilty of no wrongful act.<sup>b</sup> A similar obligation is imposed upon persons keeping wild beasts, or animals known to be dangerous.<sup>c</sup>

## NOTE TO § 146.

**Things.**

There is no definition of *res* in the *corpus juris*. Originally, no doubt, the word *res*, like its modern equivalents, denoted material objects and nothing more; but as in common parlance it was extended to mean, indefinitely, whatever can be the object of thought, so in juridical language it was extended to include whatever could be the object of a legal transaction. It is only in this extended meaning, expressly recognised by Ulpian and Hermogenianus (Dig. L. tit. 16. L. 23. L. 222), that the word *res* is capable of including rights, or, consequently, of being subdivided into *res corporales* and *incorporales*.

The following table of the Roman sub-divisions of *res* may facilitate the understanding of the text. Most of the divisions are recognised in our own law-books, see Bracton, lib. 1. c. 12; Fleta, lib. 3. c. 1; Cowell's Institutes, lib. 2. tit. 1 & 2; 2. Blackst. Com. c. 2; Co. Lit. 118 *b*, 121 *b*.

*Res* may be divided

## I. With reference to the ownership in them; into

Divini juris.

sacræ;

religiosæ;

sanctæ.

Humani juris.

nullius;<sup>d</sup>

communes;

publicæ;

universitatis;

alicujus vel privatæ.

## II. With reference to their nature; into

Incorporales.<sup>e</sup>

Corporales;

<sup>a</sup> Per Lord Holt in *Cogg's v. Bernard*, 1 Sm. L. C. 90, 92; see too *Bonsell v. Prior*, 12 Mod. 640; Jones on Bailments, 121.

<sup>b</sup> See *Davis v. Garrett*, 6 Bing. 716.

<sup>c</sup> *May v. Burdett*, 9 Q. B. 101.

<sup>d</sup> This term is also applied to *res divini juris*; see *post* note to § 147.

<sup>e</sup> Also divisible into *mobiles*, *immobiles*; see § 152.

immobiles.

mobiles; which are again divisible,

1. with reference to their power of motion; into  
    moventia;  
    mobilia.

2. with reference to their similarity; into  
    fungibiles;  
    non fungibiles.

III. With reference to the groups they form; into

Singulares.

Universales; which are again,

- res connexæ;
- res universitatis;
- facti;
- juris.

IV. With reference to their divisibility; into

Dividuæ.

Individuæ.

V. With reference to each other; into

Principales.

Accessiones; which are again,

- pertinentiæ;
- impensæ;
- fructus; viz.:
- naturales; i. e.
- naturales mere;
- industriales;
- civiles.

#### NOTE TO § 147.

##### 1.

**Extra commercium, &c.**—*Commercium* denotes the capacity of being the subject or object of ownership. It will be observed that *res extra commercium*, as defined in the text, are not identical with *res nullius*, of which the author makes no special mention, but which are constantly noticed in the corpus juris; for although all *res extra commercium* are *res nullius*, the converse will not hold.\*

It is clear that by *nullius* as applied to *res* nothing more was intended than that the thing *at the time* was not the property of any individual; a

\* See Böcking Inst. § 67.



thing at one time *nullius* might become *alicujus*, as in the case of the vacant inheritance put by Gaius (Dig. I. tit. 8. L. 1 pr.) From the same passage it appears that *nullius* was not opposed either to *publica* or *universitatis*.

*Res communes*, i.e. things, the enjoyment of which is common to all, but, the property in which is in nobody, are distinguished on the one hand from *res nullius* by being incapable of becoming the exclusive property of any person natural or juridical, and on the other hand from *res publicæ* by their use not being, even in theory, at any time confined to the Roman *cives*. The only things mentioned in the *corpus juris* as being *common*, are, the air, running-water, the sea and the sea-shore, which latter is said in the Institutes to be both common and public.

2.

As to what things are by the English law common, public, &c., see the authorities cited in the note to § 146.

NOTE TO § 149.

As by the Roman law an interdict lies for the protection of the rights common to all members of the state, so by the English law does an indictment lie for a similar purpose. See 4 Blackst. Com. 167; 3 ib. 219.

NOTE TO § 154.

**Universitas.**—By the word *universitas* is meant the one ideal whole which is formed by taking any number of distinct component parts collectively. Whether the parts themselves are corporeal or incorporeal the unity which is the result of their collective consideration is clearly ideal, fictitious, juridical.

A number of persons taken collectively, and so forming one ideal, fictitious, juridical person is (as has been already seen in the sections relating to corporations (§ 113)) termed *universitas*.

A number of material distinct things (i.e. sheep, books, &c.) taken collectively, and so forming one ideal, fictitious, juridical thing (i.e. a flock, a library), is also termed *universitas*—*universitas facti s. hominis*.

The totality of a person's rights and duties, or what is called his whole active and passive property taken collectively, and so forming one ideal, fictitious, juridical object, is also termed *universitas*, and, to distinguish it from the last, *universitas juris*.

The *universitas juris* is that which is of such great importance with reference to the legal doctrines of succession: according as a person succeeds to the *universitas* of another or only to some individual thing is he the *successor universalis* or *singularis* of that other.

An owner, as such, is empowered to dispose of what is his and to recover it from any person withholding it. But if A. sells to C. what is in fact B.'s

property, B. cannot compel A. to hand him the price, but can only proceed against C. for the recovery of the thing sold. To this principle there are however by the Roman law a few exceptions; for certain persons have the privilege of recovering in specie that which has been bought with their money. So again there is an exception in the case of an *universitas juris* with respect to which there is a law usually expressed thus, *res succedit in locum pretii, et pretium in locum rei* or *surrogatum sapit naturam ejus in cujus locum surrogatum est*. This rule, the reasons of which are not known, is itself subject to qualifications which are not however material for the understanding of the text. [Braun, § 262.]

## NOTE TO § 155.

**Divisible, Indivisible.**—The substance of this section may be thus expressed—

Divisible is that thing whose parts are capable of forming entire wholes.

Indivisible are other things.

When a thing belongs to several persons, each of whom has an exclusive right to some certain determinate part, they are said to hold the thing *pro diviso*; each person, in fact, is independent of his neighbour, and the part belonging to him is a small but distinct and separate whole.

When a thing belongs to several persons, no one of whom has an exclusive right to any determinate part, but each of whom has as much right as the others to the whole thing, they are said to hold it *pro indiviso*. [Mackeldey Lehrb. § 151 a.]

## NOTE TO § 156.

**Accessories.**

## 1.

*Accessio* is whatever is *accedens*, and is applied as well to things as to time, possession, events, contracts, &c.

Whether a thing is principal or accessory depends entirely on its relation to some other thing; the terms applied otherwise than to denote a relation are meaningless. The same thing may at the same time be principal with respect to one thing and accessory with respect to another. But no accessory thing, as such, can itself have an accessory, or, as the Romans express it, *accessio accessionis non datur*. This principle renders compound interest illegal, for interest, being accessory to the principal debt, cannot itself and as such bear interest. By the Roman law, however, that which before *litis contestatio* was merely accessory became, after it, principal and capable of standing in that relation to some other thing. [See Braun's *Erör.* p. 279.]

## 2.

For cases illustrating the maxim *accessorium non ducit sed sequitur suum principale*, see Broom's Max. 368; *Hastie v. Coutourier*, 9 Ex. 109; *Gottlieb v. Cranch*, 17 Jur. 686.

## NOTE TO § 159.

**Produce.**

A person who committing a breach of trust employs the money of another and makes a profit thereby, is compellable to account for such profit to the person with whose money it was made.\*

## NOTE TO § 163.

**Damages.**

*Damna* in the common law hath a special signification for the recompence that is given by the jury to the plaintiff or demandant for the wrong the defendant hath done unto him. Co. Lit. 257 a.

## NOTE TO §§ 164—165.

**Quanti res est.**

The general expression used to denote the pecuniary interest of a person in a thing or a transaction is *quanti res est*. This pecuniary interest may be equal to or greater or less than the market value of the thing, or the subject matter of the transaction; in other words, the *æstimatio ejus quod interest* may be equal to or greater or less than the *verum rei pretium* or *vera rei æstimatio*. For example, a horse-dealer has a horse killed by negligence; his pecuniary interest in the horse coincides with its market value. But if he had sold the horse for that value and bound himself under a penalty to deliver it at a future day, his pecuniary interest in the horse would be greater than its market value; whilst if the horse were not his, but only a pledge in his hands, his pecuniary interest might, and probably would, be less than the market value of the horse.

The pecuniary interest (*Interesse* in German) of a person in the subject-matter of a suit is the difference in the state of his property caused by the wrongful act complained of, and is ascertained by comparing the actual state of the property with the state it would have been in if no such act had occurred. Positive and negative loss must therefore both be taken into account when damage to that pecuniary interest has to be compensated.

It is to be observed that mere fancy loss, i.e. a loss appreciable only by a person who regards a thing damaged with a greater or less degree of affection is not in any case a subject-matter for compensation. On the

\* *Docker v. Somes*, 2 M. & K. 655.

other hand, every loss affecting the value of one's property must be made good, provided it be really caused by the wrongful act of another. This rule applies even although the wrong and the resulting loss are connected by a chain of circumstances, but is always to be acted upon with the greatest caution when compensation is demanded for an unacquired gain. See 2 Puchta Inst. § 260; 2 Puchta Vorles. § 224—6; and the references to § 167 in the text.

## NOTE TO § 167.

**Damages and compensation.**

The English law respecting damages and compensation may, for the purposes of the present note,<sup>a</sup> be sufficiently stated in answers to the questions, What gives rise to a right to damages or compensation? What is the amount recoverable?

**I. When due.**—In addition to special laws and agreements, the sources of an obligation to pay damages or make compensation for loss sustained by another are—

1. Unilateral permitted acts. No duty to compensate arises from the mere fact that outlays have been made, or services performed, by one person for another; the officious conduct of one man imposes no obligation on another to compensate him for the consequences of his own spontaneous act; and even though the other be benefited he cannot, on that ground alone, be compelled to pay for what he never sought to obtain.<sup>b</sup> In order that the unilateral permitted act of one person may impose upon another an obligation to compensate him, the act must have been one which the other person was under an absolute duty to do; <sup>c</sup> or one which the person seeking compensation was compelled to do, either in order to avoid loss himself,<sup>d</sup> or by virtue of some duty which, although vested in him, ought, as between him and the other, to have been performed by the latter; <sup>e</sup> or one which the other authorised either expressly or impliedly, as where he ought to have prevented it if he did not intend to make compensation; <sup>f</sup> or lastly one which

<sup>a</sup> See further, Sedgwick's measure of damages, 2 Tidd Pract. 869 *et seq.*; Bac. Ab. Title *Damages*; 2 Fonbl. Eq. Bk. v. c. 1, and 2 Story Eq. Jur. c. 19.

<sup>b</sup> See for instances illustrating this, *Galway v. Mathew*, 10 East, 264; *per* Bayley, J., 6 B. & C. 444; *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 610.

<sup>c</sup> *Ambrose v. Kerrison*, 10 C. B. 776; *Read v. Legard*, 6 Ex. 637; *Jenkins v. Tucker*, 1 H. Bl. 90; *Rogers v. Price*, 3 Y. & J. 28.

<sup>d</sup> *Exall v. Partridge*, 8 T. R. 308; and see *Pownal v. Ferrand*, 6 B. & C. 439. See as to outlays by mortgagees in possession, 2 Pow. Mortgages, 957; *Quarrell v. Beckford*, 14 Ves. 177.

<sup>e</sup> See *Pownal v. Ferrand*, 6 B. & C. 439; *Jefferys v. Gurr*, 2 B. & Ad. 833; *Hales v. Freeman*, 1 Brod. & Bing. 391; *Foster v. Ley*, 2 Scott, 438.

<sup>f</sup> *Read v. Legard*, 6 Ex. 637; *Westropp v. Solomon*, 13 Jur. 1104, C. P.; *Alexander v. Vane*, 1 M. & W. 511; *Pilling v. Armitage*, 12 Ves. p. 84, 5.

has been performed under a mistake, of which he will otherwise obtain an unfair advantage.<sup>a</sup>

2. Unilateral unpermitted acts. By the general principles of the common law every breach of a relative duty, whether its correlative right is *in rem* or *in personam*, gives rise to a claim for damages;<sup>b</sup> and this claim can be enforced, not only against the person directly guilty of such breach, but also against him by whose order, or on whose wrongful inducement the former acts.<sup>c</sup> But, as already stated, a pure accident,<sup>d</sup> or an act done in the exercise of a right,<sup>e</sup> gives rise to no action for damages. Where, moreover, a duty is imposed by statute, which also gives a remedy for its breach and that remedy is available for the benefit of the person injured, he can not obtain damages for the loss sustained but must pursue the remedy given.<sup>f</sup>

Where the unpermitted act is a tort, even infants and persons of unsound mind are compellable to make compensation;<sup>g</sup> for their wrongful acts are not deemed accidents,<sup>h</sup> and the intention with which a tort is committed only affects the amount of the damages to which the person injured is entitled. But such persons are not liable to make good losses resulting from an act which is wrongful only if done *malo animo*.<sup>i</sup>

II. **Measure.**—With respect to the measure of damages, the great principle is that an injured person is entitled to such a sum as adequately compensates him for the pecuniary loss sustained, strictly in consequence of the act complained of.<sup>k</sup> A larger sum than this is only recoverable by virtue of some special enactment, giving double or treble damages, i.e. double or treble the amount given by a jury,<sup>l</sup> or where the wrong is one of so aggravated a nature that the mere pecuniary loss, resulting from it, is no measure of the vexation and annoyance endured by the injured person; (vindictive, exemplary damages.)<sup>m</sup>

<sup>a</sup> Com. Dig. *Chanc.* 4 I. 3, citing Lev. 152; *Walley v. Walley*, 1 Vern. 487; *Swan v. Swan*, 8 Price, 518; 2 Story Eq. Jur. § 799 a, 1237. See the decree in *Necrom v. Clarkson*, 2 Harc, 176; and other cases cited in Seton on Decrees, p. 38. In America it was held by the late eminent jurist Story, that a bill would lie in Equity for compensation for betterments made by a *bona fide* purchaser in possession, but who was afterwards evicted at law. *Bright v. Boyd*, 1 Story Rep. 478. See 2 Greenleaf Ev. § 549.

<sup>b</sup> Com. Dig. *Action on the case* (A).

<sup>c</sup> See *Ellis v. The Sheffield Gas, &c. Co.*, 2 E. & B. 767; and the great case of *Lumley v. Gye*, 2 Ell. & Bl. 216.

<sup>d</sup> *Ante* note to § 140 p. lxxxiii.

<sup>e</sup> *Ante* note to § 58 p. xxx.

<sup>f</sup> See *Couch v. Steel*, 3 E. & B. 402.

<sup>g</sup> 2 Greenleaf Ev. § 270; Vin. Ab. *Lunatic* G.<sup>1</sup>

<sup>h</sup> But see 3 Vang. Leitf. § 571, Anm. 2.

<sup>i</sup> E. g. a fraudulent misrepresentation, *Price v. Hewitt*, 17 Jur. 4.

<sup>k</sup> See 2 Greenleaf Ev. § 256.

<sup>l</sup> 2 Tidd Prac. 893.

<sup>m</sup> See *Merest v. Harvey*, 5 Taunt. 442; 2 Fonbl. Eq. Bk. V. c. 1 § 1.

However every pecuniary loss, which would not have been sustained in the absence of the wrong complained of, cannot be taken into account in estimating the damages recoverable from the doer of the wrong; *the damage must not be too remote* and the great difficulty in any particular case is to apply the leading principle with this important qualification. The main general rules relating to this subject are as follows—

1. If the parties have themselves fixed the amount of compensation payable in a given case, that amount and that alone is the sum recoverable.<sup>a</sup>

2. If no such sum is fixed and the wrong complained of is a breach of

A. An alternative duty; the loss sustained by non-performance, in the way *least* beneficial to the other side, is the measure of the damages recoverable; <sup>b</sup> for the option is with the person obliged.

B. A duty which is not alternative; then if the duty is one

a. Arising from an agreement, express or implied, the measure of damages is the loss which ordinarily arises from similar breaches of similar contracts; but it is not the loss which, though in fact sustained, arose in consequence of the peculiar position of the person complaining; unless indeed such position and the consequent probability of unusual loss were known to the other side when he entered into the contract.<sup>c</sup>

b. Arising otherwise than from agreement and—

a. If the injury is such as to affect the plaintiff's person or character or position in society, or is committed under circumstances which, according to the prevailing notions of the day, aggravate the offence, there seems to be no measure except the opinion which a jury may form upon a consideration of all the circumstances; and unless their verdict is outrageous it will not be interfered with on the ground that the damages given are excessive or the contrary.<sup>d</sup>

β. If the injury does not fall within the class last referred to, the damages should be such as to put the person injured, as nearly as may be, in the same situation in which he would have been if the injury had not been committed; <sup>e</sup> and if the injury is to property and the best evidence of its value has been destroyed by the defendant, it must be taken to have been of the greatest value possible.<sup>f</sup>

<sup>a</sup> *Lowee v. Peers*, 4 Burr. 2229; 2 Tidd Prac. 876.

<sup>b</sup> See *Robinson v. Robinson*, 1 De G. Mc. & G. 257, 8.

<sup>c</sup> See *Hadley v. Baxendale*, 9 Ex. 341; *Peterson v. Eyre*, 13 C. B. 353.

<sup>d</sup> See 2 Tidd Prac. 882 &c., 888 &c.; 2 Greenleaf Ev. § 266; *Merest v. Harvey*, 5 Taunt. 442.

<sup>e</sup> See 2 Tidd Prac. 884 *et seq.* Vin. Ab. *Consequential Damage*; *Newman v. Zachary*, Aleyn 3; *Roswell v. Prior*, 12 Mod. 640. See the forms of the decrees to account in Seton on Decrees, 474, 485. As to mental sufferings see *Blake v. The Midland Counties' Rail.*, 16 Jur. 562.

<sup>f</sup> *Amory v. Delamirie*, 1 Sm. L. C. 151.

## NOTE TO § 169.

**Interest.\***

In order to understand the Roman law of interest it must be borne in mind that—

1. The interest was reckoned in twelfth parts of an *as*.
2. The period for which interest was reckoned was one *month*, and not, as in modern times, one year.
3. The highest rate of interest allowed, in the time of the classical jurists, was one hundredth part of the capital (*sors* or *caput*) per month (*usura centesima*), or, as we should say, 12 per cent.
4. To denote less than 12 per cent. recourse was had to the names given to the twelfths of an *as*, and these names were as under—

$\frac{1}{12}$	—	uncia	
$\frac{2}{12}$	—	sextans	= sexta assis pars.
$\frac{3}{12}$	—	quadrans	= quarta „ „
$\frac{4}{12}$	—	triens	= tertia „ „
$\frac{5}{12}$	—	quincunx	= quinque unciae.
$\frac{6}{12}$	—	semis	= semi assis.
$\frac{7}{12}$	—	septunx	= septem unciae.
$\frac{8}{12}$	—	bes	= bis triens ?
$\frac{9}{12}$	—	dodrans	= dequadrans i.e. as demta quadrante.
$\frac{10}{12}$	—	dextans	= desextans.
		or	
$\frac{11}{12}$	—	decunx	= decem unciae.
		deunx	= demta uncia.

The following table will now be intelligible :—

1.	p. c. is denoted by	Unciæ or unciariæ usuræ.	
2.	„	Sextantes	„
3.	„	Quadrantes	„
4.	„	Trientes	„
5.	„	Quincunces	„
6.	„	Semisses	„
7.	„	Septunces	„
8.	„	Besses	„
9.	„	Dodrantes	„
10.	„	Dextantes	„
11.	„	Deunces	„
12.	„	Asses or centesimæ	„

## NOTE TO § 171.

**When payable.**—By the ancient common law of England the taking of interest was in every case illegal, and a breach of this law exposed the so-

\* From Vangerow Leitf. § 77, and the Dict. of Gr. & Rom. Antiq. art. *Interest of Money*.

called usurer to pains and penalties.<sup>a</sup> Although the crime of taking interest gradually became smaller and smaller in the eyes of the people as trade and civilisation increased, and may be now said to have vanished, and although the doctrines relating to interest have gradually become more and more liberal, there has been an evident tendency at law (but not in Equity<sup>b</sup>) to disallow rather than to allow interest where it has not been made payable by express stipulation.<sup>c</sup>

In the absence of an express agreement or direction for the payment of interest, the principal cases in which it is now recoverable either *eo nomine* or as damages<sup>d</sup> are as follows:—

1. Where the claim to it is supported by custom;<sup>e</sup>
2. Or by the general mode of dealing between the parties.<sup>f</sup>
3. By a person who has used as his own, or made interest of money wrongfully detained from another.<sup>g</sup>
4. Where the principal is a sum certain, bequeathed by will;<sup>h</sup>
5. Or awarded to be paid on a day named, if the sum be then demanded and not paid;<sup>i</sup>
6. Or due upon a bond;<sup>k</sup>
7. Or by the judgment of a court of record;<sup>l</sup>
8. Or is payable by virtue of a written instrument on a day certain;<sup>m</sup>
9. Or has been demanded in writing and notice has been given that interest will be claimed.<sup>n</sup>

But in other cases it appears to be settled that, at law, interest is not payable upon the simple ground that one person delays the payment of money due to another;<sup>n</sup> and, notwithstanding many dicta to the

<sup>a</sup> See Wilkins Leg. Ang. Sax. p. 209; Glanv. lib. 8. c. 16, and lib. 10. c. 3.

<sup>b</sup> See 2 Fonbl. Eq. Bk. 5. c. 1, § 2; Com. Dig. Chanc. (3 S).

<sup>c</sup> See Chitty on Con. 558; *Higgins v. Sargent*, 2 B. & C. 349; *Calton v. Bragg*, 15 East, 223; *De Havilland v. Bowerbank*, 1 Camp. 50.

<sup>d</sup> Interest not recoverable as such, but only as damages, may be withheld by a jury if they think proper. 2 Tidd Prac. 873.

<sup>e</sup> See 2 B. & C. 349; 9 *ib.* 381. E. G. on bills of exchange and promissory notes, Sm. Merc. Law, 243.

<sup>f</sup> *Gwyn v. Godby*, 4 Taunt. 346; *Bruce v. Hunter*, 3 Camp. 467; *ib.* 496.

<sup>g</sup> *Perkins v. Bayntum*, 1 Bro. C. C. 375; *Rogers v. Boehm*, 2 Esp. 704; *De Havilland v. Bowerbank*, 1 Camp. 50.

<sup>h</sup> See 2 Wms. Exors. 1221.

<sup>i</sup> *Hillhouse v. Davis*, 1 M. & S. 169; 2 Tidd Prac. 873; but see *Collett v. Newnham*, 1 Drew. 447.

<sup>k</sup> 2 Tidd Prac. 874; *Farquhar v. Morris*, 7 T. R. 124.

<sup>l</sup> *M'Clure v. Dunkin*, 1 East, 436; 1 & 2 Vic. c. 110, § 17.

<sup>m</sup> 3 & 4 Wm. IV. c. 42, § 28. Whether in these two cases interest can be obtained or not, depends at law upon the jury.

<sup>n</sup> See *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 349; *Page v. Newman*, 9 B. & C. 378; *Arnott v. Redfern*, 3 Bing. 355, has not been followed.



contrary,<sup>a</sup> it seems that a similar doctrine prevails in Equity.<sup>b</sup> However in Equity, interest is always given upon money detained in breach of trust.<sup>c</sup>

With respect to the time from which interest is payable; even if a day be agreed upon, the misconduct of the person to receive the interest may justify the other in refusing to pay it from such time,<sup>d</sup> although of course, as a rule, the time fixed decides the question. If no time be fixed, then the only general rule which can be laid down appears to be that if the principal bears interest irrespective of the wrongful conduct of the debtor, the interest must be computed from the time when the creditor can be said to have been deprived of the use of the principal; whilst if the interest be payable as damages for wrongful detention, the time when the detention first became imputable delay is that from which the interest must be reckoned.<sup>e</sup>

#### NOTE TO §§ 172—6.

**Rate of interest.**—In England, as in other countries, there were well intentioned but mischievous laws prohibiting, in certain cases, the taking of more than a fixed rate of interest. For an account of these laws and of the cases decided upon them, the reader is referred to 2 Blackst. Com. 454, and the title *Usury* in the Digests and books on Contracts and Pleading and Evidence. The Usury laws are however now happily repealed.<sup>f</sup> The principal modern rules upon the subject may be thus stated. Supposing interest at some rate or other to be payable—

I. Five per cent. was the highest allowed,

1. Whether there was any agreement to the contrary or not,<sup>g</sup>

A. On debts of £10 or under; so

B. On negotiable instruments made payable more than twelve months after date, or having more than twelve months to run; and

C. On money secured upon real property.

2. Where no rate was fixed by agreement between the parties.<sup>h</sup>

But where interest was payable by virtue of a contract made abroad these rules did not apply. For if, in such cases, the rate was fixed by

<sup>a</sup> See *Ekins v. East India Comp.*, 1 P. W. 395; *Craven v. Tickle*, 1 Ves. J. 63.

<sup>b</sup> See *Tew v. The Earl of Winterton*, 1 Ves. J. 451; *Creuze v. Hunter*, 2 ib. 157; *Booth v. Leycester*, 1 Keen, 247, and 3 M. & Cr. 459.

<sup>c</sup> See 2 Madd. Ch. 164, 5; 1 Ves. J. 452.

<sup>d</sup> For instances see *Devisme v. Devisme*, 1 Mc. & G. 336; *Robertson v. Skelton*, 12 Beav. 363; *Rosley v. Adams*, ib. 476; *Sherwin v. Shakespeare*, 17 Beav. 267.

<sup>e</sup> Compare the cases on Bills of Exchange in Bayley on Bills, 351 &c.; on Legacies in 2 Wms. Exors. 1221; 2 Fonbl. Eq. Bk. 5. c. 1. § 3; *Donovan v. Needham*, 9 Beav. 164; *Creuze v. Hunter*, 2 Ves. J. 157.

<sup>f</sup> 17 & 18 Vic. c. 90; an exception is made as regards pawnbrokers.

<sup>g</sup> 12 Anne st. 2, c. 16; 2 & 3 Vic. c. 37.

<sup>h</sup> 2 & 3 Vic. c. 37, § 2.

agreement, that rate was payable unless it was forbidden by the laws of the country where the contract was entered into;<sup>a</sup> and if no rate was fixed the current rate of interest there was that which was payable.<sup>b</sup>

Moreover, 5 per cent. is the rate of interest payable in Equity by a trustee who has misapplied the monies entrusted to him, or has derived benefit therefrom.<sup>c</sup>

II. Four per cent. is the rate payable—

1. On judgment debts: 1 & 2 Vic. c. 110, § 17.

2. In ordinary cases where, there being no special provision as to the rate of interest, interest by way of damages is awarded by courts of justice.<sup>d</sup>

III. The current rate of interest is the highest which the jury are authorised to give by the statute 3 & 4 Wm. IV. c. 42, § 28. (*ante* note to § 171.)

IV. The rate of interest payable by express agreement was, even before the late act, allowed to be recovered, except in the cases prohibited by the usury laws, i.e. in the cases denoted above by the marks, I. 1. A. B. C. Now that the usury laws no longer exist, parties agreeing as to the rate of interest will, it is apprehended, always have to abide by their agreement in that as in other respects.

The cases in which an agreement to take more than 5 per cent. was or not usurious and illegal will be found collected in the works above mentioned. It is only necessary here to observe, that there was no usury unless there was both forbearance and an agreement to take, or an actual taking of more than 5 per cent. in consideration of such forbearance.<sup>e</sup>

#### NOTE TO § 177.

**Compound interest.**—As a general rule compound interest is not allowed by the law of England. Indeed it has been said that (except perhaps as to mercantile accounts current for mutual transactions), an express contract to pay such interest is invalid.<sup>f</sup> However, it is clear that accounts may be made up half yearly, and that interest may be charged on the balances then

<sup>a</sup> See *Harvey v. Archbold*, 3 B. & C. 626.

<sup>b</sup> *Gibbs v. Fremont*, 9 Ex. 14; 2 Tidd Prac. 874; *Ekins v. East India Comp.*, 1 P. W. 396; *Connor v. Bellament*, 2 Atk. 382. These two rules are a *fortiori* correct now that the usury laws do not exist.

<sup>c</sup> 16 Beav. 505; *Williams v. Powell*, 15 Beav. 461; *Jones v. Foxall*, ib. 388; and see *Treves v. Townshend*, 1 Bro. C. C. 384, and the cases in the note there.

<sup>d</sup> *Perkins v. Bayntun*, 1 Bro. C. C. 375; ib. 384 note; *Tebbs v. Carpenter*, 1 Madd. 290; 2 Wms. Ex. 1229, 1569.

<sup>e</sup> See *Chesterfield v. Janssen*, 2 Ves. S. 125; Chitty on Contracts, 604 &c., 4th ed. Chitty Col. Stat. tit. *Usury*.

<sup>f</sup> See *Ferguson v. Pyffe*, 8 Cl. & Fin. 121; *ex parte Bevan*, 9 Ves. 224; ib. 271; 4 Madd. 64 n. Query now that the usury laws are repealed.

found due.<sup>a</sup> In equity, moreover, compound interest is decreed to be paid by a person who commits a breach of trust by positively misapplying another's money;<sup>b</sup> but not if he merely keeps in his own hands monies which he is directed to invest and accumulate.<sup>c</sup>

#### NOTE TO § 178.

#### Consequences of Usury.

The consequences of usury were as follows. If interest at a higher rate than 5 per cent. was in the prohibited cases—

I. Reserved by any contract; the contract was wholly null and void,<sup>d</sup> and could not be enforced by any person however innocent.<sup>e</sup> But the transaction was void only so far as was necessary to prevent an evasion of the statute of Anne, so that, if there were two securities for the same sum, the invalidity of one of them did not necessarily render the other void.<sup>f</sup>

II. Actually received by the creditor, then—

1. The debtor could recover the excess by an action for money had and received to his use by the creditor.<sup>g</sup>

2. The creditor incurred a penalty equal to treble the amount of the loan and recoverable by any informer.<sup>h</sup>

#### NOTE TO § 180.

#### Cessation of interest.

<sup>i</sup> Interest being payable in consideration of a principal sum owing, when the latter ceases to exist the former ceases to accrue; nevertheless interest may continue payable in respect of a sum which the creditor has agreed to take no steps to recover from his debtor.<sup>j</sup>

#### NOTE TO § 181.

#### Discount.

##### 1.

With respect to discount it must be remembered that a creditor cannot be

<sup>a</sup> *Ex parte Bevan*, 9 Ves. 224; *Dawes v. Pinner*, 2 Camp. 586 n; *Eaton v. Bell*, 5 B. & A. 34.

<sup>b</sup> *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, ib. 461; *Raphael v. Boehm*, 11 Ves. 92; 13 ib. 407, 590; *Knott v. Cotter*, 16 Beav. 77; 2 Wms. Ex. 1572 *et seq.*

<sup>c</sup> *Tebbs v. Carpenter*, 1 Madd. 290.

<sup>d</sup> 12 Anne, st. 2, c. 16.

<sup>e</sup> 1 Wms. Saund. 295 b; an exception was made by 58 Geo. III. c. 93, in favour of *bona fide* holders for value of negotiable instruments.

<sup>f</sup> See *Lane v. Horlock*, 1 Drew. 613; *Ex parte Warrington*, 3 De G. Mc. & G. 159; *James v. Price*, Kay, 231.

<sup>g</sup> See *Smith v. Bromley*, 2 Dougl. 697 a; Cowp. 792.

<sup>h</sup> 4 Bl. Com. 157; 12 Anne st. 2, c. 16; see the precedents in 2 Ch. Plead. 359.

<sup>i</sup> See *Bateman v. Margerison*, 16 Beav. 477.

compelled against his will to accept payment before the day appointed, and to allow discount in consideration of the prepayment. A contrary opinion is sometimes founded on L. 70 *de solut.* (46. 3) L. 50 *de O. et A.* (44. 7), but these passages merely state that a debtor may pay what he owes before the time appointed, which he of course may do *in full*; they do not contain a word about discount. Another passage, L. 24, § 2, *sol. matr.* (24. 3), also referred to in support of the opinion, is again no authority for it; this law is to the effect that a person bound to give security for payment at a future time and unable so to do may be called upon to pay immediately on being allowed a proper discount. It is nowhere said that the creditor can be compelled to accept prepayment with discount. [3 Vang. Leif. § 587, *ann.* 7.]

## 2.

The difference between the three modes of reckoning discount mentioned in the text may be thus illustrated: Suppose A. to have borrowed of B. £1000, to be repaid without interest twenty years hence, and that A. is desirous of discharging his debt now. The question is how much less than £1000 must he pay, the customary rate of interest being 5 per cent.?

Carpzov and Pinkard answer—A. pays in 1800 what he is not called upon to pay until 1820; he should consequently deduct 5 per cent., i.e. £50 for the year 1800, after which there remains £950 due; he should then deduct 5 per cent. i.e. £47 10s. for the year 1801, after which there will remain £902 10s. and from this he should deduct another 5 per cent. for the year 1802, and so on. This mode of reckoning is simply absurd, for if the time originally fixed for payment be distant, the debtor, paying early, will in fact give his creditor scarcely anything, or at all events far less than sufficient, even with interest, to amount at the end of the time to the whole sum due.

Both Hofmann and Leibnitz proceed upon the correct principle, that the debtor should pay so much as will enable the creditor, by investing his money, to have, at the end of the period given the debtor for payment, precisely what would then have been paid if no variation had been made in the time of payment. The only difference between them is, that Hofmann considers that the creditor should be dealt with as if he invested his money at simple interest; whilst Leibnitz thinks that the calculation should proceed upon the assumption that he invests his money at compound interest.

According, therefore, to Hofmann, a debtor who pays in 1800 a debt of £1000 which he is not called upon to pay until 1801, cannot deduct 5 per cent. on the £1000, as Carpzov and Pinkard say he should, for the £950 which would then be left, would not, at 5 per cent., yield £50 in one year, but only £47 5; the debtor should pay that sum, which, if put out at simple interest at the rate of 5 per cent., will, at the end of one year, amount with the interest to exactly £1000, i.e. £952 38. To return to the example above put, if A.

having in the year 1820 to pay £1000 is ready to liquidate the debt in 1800, he should pay £500, for this with simple interest at 5 per cent. for twenty years will, at the end of that time, amount to £1000 exactly.

But, mathematically speaking, even this is not correct; for the interest which the creditor makes every year can itself be put out to interest at 5 per cent., and be converted into capital yielding interest. It is for this reason that Leibnitz disapproved of Hofmann's mode of reckoning, and insisted that the debtor, paying before the time fixed, should be called upon to pay only such a sum as would, with *compound* interest, amount, by the time originally fixed for payment, to the sum stipulated to be then paid. It is clear that this is no infringement of the law prohibiting the taking of compound interest. Leibnitz does not require a debtor to pay interest on any interest he may owe already, but merely insists that the creditor should employ his money profitably and take into account the gain thereby obtained. The law against compound interest only forbids the payment of interest on interest already payable, but in no way prohibits the investment at interest of money already received for interest on a principal lent.

The only possible objection to Leibnitz's mode of computation is that it presupposes the instant profitable investment of the small sums from time to time received by way of interest. It very often happens that this cannot be accomplished, and where that is the case it is of course unjust to treat the interest received for the principal as itself bearing interest. The judge must consequently *ex æquo et bono* make a just allowance where this objection applies.

Considerable difficulty has been occasioned by two passages in the *corpus juris*, viz. : L. 3, § 2. L. 88, § 3. ad. leg. Falcid. (35. 2). In one of these Carpzov's principle is followed, whilst in the other Hofmann's is adopted. Some writers, and amongst them Schrader, have been induced by this circumstance to lay down Hofmann's rule as generally applicable. It seems, however, better to treat the above two cases as incapable of forming the basis of any general rule, and, where the laws prescribe not, to follow Leibnitz and one's common sense. (Braun's Erör. § 289).

### 3.

Acceptance of a debt before it is due cannot be usury, whether any sum or none be deducted by way of discount; by such a transaction a creditor derives no advantage for his forbearance, but at most only a premium for the early discharge of his debtor.<sup>a</sup>

The principle upon which discount is usually calculated in this country is, it is believed, that contended for by Leibnitz, but no reported case has been met with upon the subject.<sup>b</sup>

<sup>a</sup> See *Barclay v. Walsley*, 4 East, 55; and as to prepayment of interest, *Barnes v. Wortlich*, Cro. Jac. 25.

<sup>b</sup> Vin. Ab. *Discount* is a collection of cases on set-off.

## NOTE TO § 182.

**Mediate, Immediate Duties.**

The Roman division of duties into mediate and immediate, and of actions into *dative* and *native*, is founded on the following consideration. There are certain obligations which arise from events having a generic name, e.g. *ex contractu*, *ex delicto*, *quasi ex contractu*, *quasi ex delicto*, and there are others which arise without any event having such name, e.g. the duty of a father to support his son. Obligations of the last description were said to arise *ex lege* or *immediate ex lege*, and those of the first kind were, by way of contra-distinction, said to arise *mediate ex lege*. The division is not absurd, but is of little value as it arises rather from an accidental mode of speaking than from any solid distinction. [Braun Erör. § 131.]

## NOTE TO §§ 183—185.

**Formalities.**

## 1.

We have already seen (note 1 to § 79) that the omission of forms *directed* by a statute does not necessarily invalidate the transaction in which they ought to have been observed. In such cases the maxim is, *fieri non debuit sed factum valet*. In the next note it will be seen when the absence of prescribed forms is fatal and when not.

## 2.

Strict proof of the due observance of formalities in transactions is often rendered unnecessary by the sensible rule, *Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*, or, as it is often more shortly expressed, *Omnia præsumuntur rite esse acta*. Cases illustrating this maxim will be found in Best on Presumptions, p. 74 *et seq.*; Broom's Maxims, 729 *et seq.*; and in the various treatises on the law of Evidence. According to Lord Coke, where different persons have to perform several acts, proof of one of them does not dispense with proof of the others, although the one proved would be inoperative in the absence of the others; but it is otherwise if all the acts have to be performed by one and the same person (9 Co. 82 *b*).

## NOTE TO § 186.

## 1.

**Observance of.**—Forms are imposed by statute or by the common law or by the will of a private individual.

If imposed by statute, the effect of their omission depends upon the question whether the statute renders them essential or only *directs* their observance (*ante* note 1 to § 79). The non-observance of a form which is

rendered by statute indispensable to the validity of a transaction, is fatal, and cannot be supplied or aided in equity unless in cases of manifest fraud.<sup>a</sup>

If a form is imposed by common law, or by the will of a private individual, the non-observance of the form renders the transaction in which it ought to have occurred wholly invalid at law; <sup>b</sup> unless indeed the transaction can be upheld upon the principle before adverted to—*Cum quod ago non valet ut agam valeat quantum valere potest.*<sup>c</sup> But in equity, if there has been a clear intention to engage in the transaction in which a formality is thus imposed, and an attempt has been made to carry such intention out, but, owing to some accident, or mistake, or fraud, the formality has not been observed, the defect will be supplied in favour of a creditor, purchaser for value, wife or child.<sup>d</sup> This is upon the principle expressed in the Digest, *et si nihil facile mutandum est ex solennibus tamen ubi equitas evidens poscit subveniendum est.*<sup>e</sup>

## 2.

The maxim is, *quod ab initio non valet tractu temporis non convalescit*; as to which see Broom's Maxims, p. 132.

## NOTE TO §§ 187—189.

**Evidence of will.**

For all the purposes of positive law, a person is conclusively presumed to intend the necessary and probable consequences of his own deliberate acts.<sup>f</sup>

Where a person's language or conduct is ambiguous, and there is no other mode of ascertaining his will, the rule is to make that inference which is most favourable to his opponent.<sup>g</sup>

As to the effect of a protest, see *post* note to § 194.

Silence gives rise to considerable difficulty and requires particular notice. It is often said that silence gives consent. Far more correct, however, is the doctrine of the Roman law,<sup>h</sup> "*Qui tacet non utique fateetur, sed tamen*

<sup>a</sup> See *Hibbert v. Rolleston*, 3 Bro. C. C. 571; *Ex parte Bulteel*, 2 Cox, 243; Vin. Ab. Chanc. S. pl. 8.

<sup>b</sup> See 2 Sug. Pow. 89 & 90; and the many cases at law in which the absence of sealing and delivery has been fatal, e.g. *Wood v. Leadbitter*, 13 M & W. 388.

<sup>c</sup> *Ante* note to § 80, p. liii.

<sup>d</sup> *Tollet v. Tollet*, 1 Wh. & Tud. L. C. 155, and the cases there referred to; 1 Story Eq. Jur. § 94—98, and § 169—177.

<sup>e</sup> L. 183 de R. J. (50. 17.)

<sup>f</sup> *R. v. Sheppard*, R. & R. C. C. 169; *R. v. Geach*, 9 C. & P. 499; *R. v. Dixon*, 3 M. & S. 11; *Newton v. Chantler*, 7 East, 144; *Graham v. Chapman*, 12 C. B. 98, 103; *R. v. Harvey*, 2 B. & C. 261, 4; *Haire v. Wilson*, 9 B. & C. 643; Best on Presumptions, 176; 1 Tay. Ev. § 64, &c.

<sup>g</sup> Bac. Maxims, rule 3, "A man's deeds and his words shall be taken strongest against himself."

<sup>h</sup> Dig I. tit. 17 de R. J. L. 142.

*verum est, eum non negare.*" Silence is no evidence of assent, except on the part of him who is bound to speak; <sup>a</sup> and an obligation to speak by no means arises from a mere challenge. Unless a person's conduct has been such as, in the absence of dissent, reasonably to warrant the supposition of assent, or unless he has been party or privy to a transaction which, effectual with his assent, is ineffectual without it, his silence cannot be deemed assent. In both of these cases, to give effect to unexpressed dissent would amount to a fraud upon others, but even here the assent is implied, not from mere silence but from that coupled with all the circumstances attending it. <sup>b</sup> The presumption of assent from silence is rebutted by any circumstance satisfactorily accounting for it, e.g. ignorance, mistake, fraud, or undue influence. <sup>c</sup>

## NOTE TO § 191.

**Extinction of rights, &c.**

## 1.

The great principle which governs this subject is, that, a change is not presumed. Rights or duties once shown to exist are presumed to continue, unless there is some reason to the contrary; and he who alleges that they have ceased takes upon himself the burden of proving his allegation, or at least of rebutting the above presumption. <sup>d</sup>

## 2.

It often happens that a person who cannot actively prosecute his right can nevertheless passively enforce it. <sup>e</sup> A right cannot be said to be wholly extinguished so long as it is capable of being enforced in any way.

## NOTE TO § 190.

**Subsequent assent.**

## 1.

The reader will find several cases collected in Broom's Maxims, p. 676,

<sup>a</sup> See 3 De G. Mc. & G. 712; 1 ib. 25.

<sup>b</sup> See Savigny System, § 132.

<sup>c</sup> For cases where silence has been held prejudicial, see *Lamb v. Buncce*, 4 M. & S. 275; *Pickard v. Sears*, 6 A. & E. 474; *Gregg v. Wells*, 10 ib. 90; *Draper v. Borlace*, 2 Vern. 369; *Hanning v. Ferrers*, 1 Eq. Ab. 356, pl. 10; *Lord Cawdor v. Lewis*, 1 Y. & C. Ex. 427; *Nicholson v. Hooper*, 4. M. & Cr. 179; *Rochdale Canal Co. v. King*, 16 Beav. 630; *The Duke of Beaufort v. Patrick*, 17 Beav. 60; 1 Story Eq. Jur. § 385, &c.; and for cases where it has not, see *Cross v. The General Reversion, &c. Co.*, 3 De G. Mc. & G. 698; *Cockell v. Taylor*, 15 Beav. 103; *Pilling v. Armitage*, 12 Ves. 78; *Dann v. Spurrier*, 7 Ves. 231. See further on this subject, 1 Taylor Ev. p. 537 *et seq.*

<sup>d</sup> See Best on Presumptions, 186 *et seq.*; Plow. 193, 431.

<sup>e</sup> For instances see *Courtenay v. Williams*, 3 Hare. 539; *Rose v. Gould*, 15 Beav. 189; *Higgins v. Scott*, 2 R. & Ad. 413.



illustrative of the rule *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*.<sup>a</sup> The doctrine applies as well to legal as to illegal acts.<sup>b</sup> Where, however, the validity of a transaction depends upon a person's previous assent *as upon a condition precedent*, his assent, given subsequently to the transaction, has no retrospective operation.<sup>c</sup> Moreover, the absence of previous or contemporaneous assent renders the ultimate validity of a transaction wholly contingent, it being doubtful whether the necessary ratification will ever be given or not; hence it is a rule that subsequent assent does not relate back so as to prejudice third parties whose conduct has been guided by the transaction as it actually occurred; e.g. an unauthorised notice to quit is not rendered valid by the subsequent approval of the landlord.<sup>d</sup>

## 2.

A void act is not rendered valid by being confirmed.<sup>e</sup> The confirmation in such a case may, however, operate as something other than what was intended, upon the maxim, already noticed, *cum quod ago non valet ut agam valeat quantum valere potest*.

As to acts not void, the maxim is, *Confirmatio omnes supplet defectus*.<sup>f</sup>

## NOTE TO § 192.

## Void and voidable.

The division of rights and duties mentioned in this section seems to correspond with the English division into void and voidable. A void *right*, using both words in a juridical sense, is evidently an expression inconsistent with itself. The division of *transactions* into void and voidable is not open to this objection.

The difference between acts which are void and those which are voidable only, is important, for whilst a void act cannot operate in the way intended, and cannot be rendered valid by a subsequent ratification, a voidable act is to be treated as valid until its validity is contested, and, after a subsequent

<sup>a</sup> See too *Bird v. Brown*, 4 Ex. 786.

<sup>b</sup> Vin. Ab. *Ratihabitio*.

<sup>c</sup> *Buteman v. Davis*, 3 Madd. 98; *Wiles v. Gresham*, 2 Drew. 258. In both of these cases trustees authorised to act on the request of a third person, acted without such request, and were held to have committed a breach of trust although their conduct was afterwards approved.

<sup>d</sup> *Right v. Cuthell*, 5 East, 491; *Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 143; Story on Agency, § 246, 7; Smith Merc. Law, 143.

<sup>e</sup> *Per Yelverton*, Cro. Ab. *Barre*, pl. 27; Shep. Touch. 313, 314; *Shirley v. Martin*, cited 3 P. W. 74 n. Com. Dig. *Confirmation* (D. 1.)

<sup>f</sup> Co. Lit. 295 b. See *Cole v. Gibbons*, 3 P. W. 289; *Chesterfield v. Janssen*, 2 Ves. S. 125; *Taylor v. Rockfort*, 2 Ves. S. 281; *Morse v. Royal*, 12 Ves. 355.

ratification, its validity dates back to the time when the transaction took place.<sup>a</sup> However, as before stated, any act which is void in one point of view may be valid in another, e.g. that which is void as a covenant to stand seised may be valid as a bargain and sale.

## NOTE TO § 194.

**Protestation.**

The effect of a protest is merely to exclude an inference which, in its absence, might fairly be drawn from the conduct of the party protesting. There is a maxim *Protestatio facto vel juri contraria non valet*, which, it is apprehended, means that a protest inconsistent with the conduct of him who makes it goes for nought. Such a protest might however be evidence of constraint.<sup>b</sup>

## NOTE TO § 195.

**Prescription.**

## 1.

Although it is not usual for English writers to distinguish prescription into legal on the one hand and judicial, testamentary, or conventional on the other, still as a period of time may be set otherwise than by law, and the lapse of such period may produce effects similar to those which arise in cases of prescription properly so called, it seems not only allowable but scientifically correct to consider together the effects common to lapse of time however set.<sup>c</sup> Moreover, the law relating to the effects of lapse of time cannot be confined to prescription, in the narrow sense in which the word is used by English writers, but must include the doctrines usually classed together by them under the head of limitations of actions, and (in equity) of acquiescence.

## 2.

**Lapse of Time.**

**Judicial notice of.**—The statutes of limitations cannot at law be relied upon as a defence unless specially pleaded;<sup>d</sup> or unless not only the remedy

<sup>a</sup> See *ante* note 2 to § 190; Shep. Touch. 288, 289; Vin. Ab. *Void or Voidable*; and especially Bac. Ab. *Void & Voidable*.

<sup>b</sup> For the effect of a protest in pleading *at law*, see *Graysbrook v. Fox*, Plow. 176; 2 Wms. Saund. 103; in *equity*, Beame's Pleas, 46. As to letters written *without prejudice*, see *Jones v. Foxall*, 15 Beav. 396; *Hoghton v. Hoghton*, 15 Beav. 321; 1 Tay. Ev. § 566. For instances of ineffectual protests, see *re Harrison*, 10 Beav. 59; *Birmingham Canal Co. v. Lloyd*, 15 Ves. 515; *Walker v. York & N. Midl. Rail. Co.*, 2 E. & B. 750. The old doctrines relating to Continual claim seem to have depended on the fact that it was a solemn protest.

<sup>c</sup> See Froben, § 1002.

<sup>d</sup> 2 Wms. Saund. 63; *Stile v. Finch*, Cro. Car. 381; *Chapple v. Darston*, 1 C. & J. 1.

but also the right itself is extinguished.<sup>a</sup> But in Equity, a plaintiff should show that he is suing within the time limited by those statutes,<sup>b</sup> although if the defendant does not specially claim their protection before the hearing of the cause, the court will not notice them.<sup>c</sup>

## NOTE TO § 196.

**Acquisition by.**—By lapse of time, rights, whether positive or negative, (freedom from duties), may be acquired in one of two ways; viz.—

I. Directly by continuous uninterrupted exercise or enjoyment. In this case (prescription properly so called) the conduct of the person prescribing is that which mainly gives rise to the right.

II. Indirectly by the neglect of the person interested in opposing the right. In this case the right acquired is, in truth, only a consequence of the defence given against those who do not enforce their rights within a proper time. It is their conduct rather than that of the person relying on lapse of time which gives rise to the right.

By prescription, a right may be acquired as well where there is no determinate person interested in opposing it as where there is; but it is only in the last case that a right can be acquired indirectly as above suggested.

## NOTE TO § 197.

**Immemorial Prescription.**

## 1.

Immemorial prescription is, both by the home-sprung and by the adopted laws of Germany, recognised as the *ultimum refugium* for the protection of rights, even where there is no law upon which particularly to rely. The *præscriptio immemorabilis* avails as a *præsumptio juris et de jure*, that there was at some time or other a just acquisition which can no longer be proved. Whatever right therefore can be acquired at all, as for example Royalties, can be acquired by immemorial prescription. But it must never be forgotten that the evidence, adduced in case of a disputed title by prescription, has no force except as between the litigating parties, and that whether the evidence is derived from witnesses, documents, or admissions, it is of no avail against third persons; *inter tertios acta, tertiis nec nocent nec possunt*. [Froben, § 1035.]

## 2.

The mere fact that a state of things can be shown to have existed a very long time is by the English law (if there is no statute to the contrary) only evidence that such a state had a legal origin. The presumption in favour of such an origin is, *ceteris paribus*, strong in proportion to the length of time

<sup>a</sup> *De Beauvoir v. Owen*, 19 L. J. Ex. 177.

<sup>b</sup> 3 Bro. C. C. 633 note; *Hoare v. Peck*, 6 Sim. 51.

<sup>c</sup> Mitf. Plead. 273; *Prince v. Heylin*, 1 Atk. 494.

elapsed, but nevertheless, in the absence of a statutory enactment, the presumption seems to be in every case rebuttable by evidence to the contrary.<sup>a</sup> Evidence which only shows an origin does not of course warrant an inference that it was not lawful.

## 3.

For the English law of Prescription prior to the late prescription act, the reader is referred to the title *Præscription* in Comyn's Digest, and Viner's Abridgment; 2. Blackst. Com. 263, &c., and Cruise's Digest, vol. III. title XXXI. It must not be forgotten that English writers distinguish the doctrines of prescription from the closely allied doctrines by which actions are barred (Limitations of actions). Both form but one class in the writings of continental jurists.

## NOTE TO § 198.

**Definite Prescription.**

The statute upon which the law of prescription (as distinguished from the law relating to the limitations of actions) now mainly depends, is 2 & 3 Wm. IV. c. 71.<sup>b</sup> Upon this statute the reader is referred to the notes appended to it in Shelford's Real Property Statutes, and in the 3rd vol. of Chitty's Collection of Statutes. See too Sugden's Essay on the Real Property Statutes.

The times which must elapse before a right can be acquired, beyond dispute, by prescription are as follows:—

60 years in cases of rights of common and profits *a prendre*.

40 years in cases of easements generally.

20 years in case of a claim to light.

Enjoyment during these times must not have been in pursuance of any agreement. In the two first cases moreover, enjoyment for 30 years or 20 years respectively is sufficient, if the evidence on the other side only goes to show the time when the enjoyment commenced.<sup>c</sup>

## NOTE TO § 199.

## 1.

**Possession.**—The exception in the case of quasi-possession is explained by the fact that the rights to which the expression applies (see § 229) cannot

<sup>a</sup> That there is a presumption of legality, see *Delarue v. Church*, 15 Jur. 455; *R. v. Powell*, 3 E. & B. 377; 3 De G. Mo. & G. 418; 17 Beav. 390; Best on Presumptions 103, and that the presumption is rebuttable, see Best *ubi sup.* 90; Com. Dig. *Præscr.* E; Co. Lit. 115 a.

<sup>b</sup> As to Tithes, see 2 & 3 Wm. IV. c. 100.

<sup>c</sup> See 2 & 3 Wm. IV. c. 71.

be acquired by prescription if they are exercised *vi, clam, aut precario*, and that their exercise after protest is deemed an exercise *vi*. [Froben, § 1006.]

## 2.

**Interruption.**—For illustrations of the necessity of continuous uninterrupted enjoyment, see Co. Lit. 113 *b*; Com. Dig. *Præscription* (E. 2); 3 Cruise Dig. tit. 31, c. 1, § 25.

And as to what amounts to an interruption, see Co. Lit. 114 *b*.

By the statute 2 & 3 Wm. IV. c. 71, § 4, in order that there may be an interruption, sufficient to invalidate a title by prescription under that act, there must be some act or matter submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorising the same to be made. Moreover, the same section enacts that each of the respective periods, in the act mentioned, shall be deemed and taken to be the period next before some suit or action, wherein the claim to which such period may relate, shall have been or shall be brought into question. This section has undergone much discussion, the result of which seems to be as follows:—

1. Enjoyment within a year next before the commencement of litigation must be proved. Consequently even after the whole period has elapsed, the right acquired may be lost by non-enjoyment for one year before the commencement of litigation.<sup>a</sup>

2. An interruption, at whatever period after the time has once begun to run, does not prevent the acquisition of a prescriptive right, unless acquiesced in for a whole year. Consequently, acquisition cannot be prevented by any interruption made during the last year of the period applicable to the right in question;<sup>b</sup> unless indeed such interruption be acquiesced in for one year before the commencement of litigation.

## NOTE TO § 201.

## 1.

**Bona fides.**—The last two sentences of § 201 turn upon the passage in the *Corpus juris Canonici* requiring good faith. A land-owner who prescribes against a right of way, in consequence of its non-user, cannot in any sense be charged with want of good faith; he has what is his own and not what he knows to be another's property. The debtor, however, in the case put, keeps what he knows is not his, and although he is not bound to deliver what he detains until requested by the creditor; this circumstance however

<sup>a</sup> See *Lowe v. Thomas*, 6 Ex. 825; *Parker v. Mitchell*, 11 A. & E. 788.

<sup>b</sup> *Flight v. Thomas*, 2 Bing. N. C. 688; and on appeal in 11 A. & E. 688, and 8 Cl. & Fin. 231.

does not prevent the existence of *mala fides* in the sense intended by the Canon law. [Froben, § 1008.]

## 2.

By the English law, *bona fides* on the part of the person prescribing does not appear to be requisite even in equity, but knowledge on the part of the person prescribed against is essential.<sup>a</sup> In this, acquisition of a right by prescription differs from acquisition by the operation of the statutes of limitation (see note to § 206, 207).

## 3.

As to who is, by the English law, deemed a *bona fide* possessor, see *post* note to § 218.

## NOTE TO § 202.

**A suitable object.**—For rights which cannot be acquired by prescription see Com. Dig. *Præscr.* (D.) & (F.); Vin. Ab. *Præscr.* (B.) (S.) (U.) Here especially, the narrow technical meaning of the English word prescription must always be borne in mind.

## NOTE TO § 203.

**Opportunity to interpose.**—The following cases, decided upon the statutes of limitation, illustrate the principle that time does not begin to run so long as there is no opportunity or occasion to interpose.

1. Where the same person is bound to pay and is also entitled to receive the same sum—*Raffety v. King*, 1 Keen, 601; *Hyde v. Dallaway*, 2 Hare, 528; *Burrell v. Earl of Egremont*, 7 Beav. 205; *Wynne v. Styam*, 2 Ph. 303; *Spickernell v. Hotham*, Kay, 669.

2. No person capable of suing. *Murray v. E. India Comp.*, 5 B. & Ald. 50.

3. No person capable of being sued. *Dupleix v. De Roven*, 2 Vern. 541; *Tannin v. Anderson*, 7 Q. B. 811; *Douglas v. Forest*, 4 Bing. 686.

4. No occasion to interfere. *Smith v. Lloyd*, 9 Ex. 562.

## NOTE TO § 205.

**Extinctive prescription.**

## 1.

The statement in the text that the extinction, by lapse of time, of the power to sue is the extinction of the right itself, and consequently of all the remedies active and passive by which it can be enforced, is contested by some writers, who, relying on the general principle mentioned in § 191, contend that lapse of time does not necessarily deprive a person of the power of

<sup>a</sup> *Daniell v. North*, 11 East, 370.

enforcing his right passively by an *exceptio*. However, immemorial prescription clearly extinguishes the right itself and not merely the power to enforce it by action; and, as regards definite prescription, whenever the grounds of the *exceptio* and the *actio* are alike, it would be very illogical after the latter was barred to allow an *exceptio ex eadem causa*. The laws cited in the text support this view. [See Froben, § 1019.]

## 2.

Whether, by the English law, lapse of time extinguishes the right or is only a bar to an action or suit, depends, in every case, upon the language of the statute applicable to it.

The right is extinguished, and all the remedies for it, whether active or passive, are barred in those cases which are governed by 2 & 3 Wm. IV. c. 71 and 3 & 4 Wm. IV. c. 27.<sup>a</sup>

The right is not extinguished, but the power of enforcing it, by active proceedings in a court of justice, is alone barred by 21 Jac. I. c. 16.<sup>b</sup> But still to a plea of set-off, the statute of limitations may be effectually replied; <sup>c</sup> and it may happen that an action or suit is the only remedy available, in which case, of course, the right is indirectly but completely extinguished.

## NOTE TO §§ 206, 207.

## 1. Limitations of actions.

The principal statutes limiting the time within which actions and suits must be brought, are 3 & 4 Wm. IV. c. 27, and 21 Jac. I. c. 16. These statutes are fully as binding in courts of Equity as in courts of law.<sup>d</sup>

The time within which any particular action or suit must be brought varies with the action. The limits in the most important cases are as follows—

100 years; the extreme limit for the recovery of an advowson and right to a presentation. 3 and 4 Wm. IV. c. 27, § 33.

60 years or (a) 3 incumbencies; ordinary limit for same (*ib.* § 30), (b) 2 incumbencies and 6 years; limit for the recovery of land or rent by a corporation sole (*ib.* § 29). The reckoning is by years or incumbencies according as the former or the latter cover the longest period of time.

40 years; the extreme limit for the recovery of land or rent by any person other than a corporation sole (*ib.* § 17).

<sup>a</sup> See § 34 of the last statute; 5 Beav. 76.

<sup>b</sup> *Williams v. Jones*, 13 East, 439; *Ex parte Dewdney*, 15 Ves. 479; *Courtenay v. Williams*, 3 Hare, 539; *Rose v. Gould*, 15 Beav. 189.

<sup>c</sup> Bull. N. P. 180 a.

<sup>d</sup> *Horenden v. Annesley*, 2 Sch. & Lef. 630; *Smith v. Clay*, 3 Bro. C. C. 640. Dicta to the contrary may be found, e.g. in 3 Bro. C. C. 639; 3 Atk. 226; but they surely are against all principle.

20 years; the limit for the same under ordinary circumstances (*ib.* § 2); and also for the redemption of mortgages (*ib.* § 28); and for the recovery of legacies, and of rent, and of money charged on land (*ib.* § 40); and the limit for actions and suits on specialties (3 & 4 Wm. IV. c. 42).

6 years; the limit for (a) the recovery of arrears of dower, rent, interest of money charged on land (3 & 4 Wm. IV. c. 27, § 41, 42); (b) personal actions not otherwise limited (21 Jac. I. c. 16; 3 & 4 Wm. IV. c. 42).<sup>a</sup>

4 years; the limit for actions of assault, battery, false imprisonment (21 Jac. I. c. 16, § 2).

2 years; the limit for actions for (a) words of themselves defamatory,<sup>b</sup> (21 Jac. I. c. 16, § 2); (b) penalties, damages, or sums given by statute to the party grieved (3 & 4 Wm. IV. c. 42).

The time begins to run from the moment the right to sue accrues to a person within the realm, of full age, of sound mind, out of prison, and, if a woman, unmarried.<sup>c</sup> The time at which the right to sue accrues depends upon the circumstances of each particular case;<sup>d</sup> but, as a general principle, it may be stated that it first accrues when there is some act or forbearance by which a right is infringed.<sup>e</sup> The time when the wrongful act is first discovered is, in the absence of a fraudulent concealment, wholly immaterial;<sup>f</sup> but, if there be fraud, the time does not run until it has, or with reasonable diligence might have been discovered.<sup>g</sup>

The right of a cestui-que-trust to sue his trustees, if founded upon a breach of an express trust, is not barred by lapse of time;<sup>h</sup> but it is otherwise if the trust be only constructive.<sup>i</sup>

<sup>a</sup> As to accounts, see *Webber v. Tyrill*, 2 Wms. Saund. 124 and the notes there; *Inglis v. Haigh*, 8 M. & W. 769, 777; *Cottam v. Partridge*, 4 M. & G. 271; *Robinson v. Alexander*, 8 Bligh N. S. 352. Agency accounts, *Smith v. Pococke*, 2 Drew. 197. Partnership accounts, *Penny v. Pickwick*, 16 Beav. 246.

<sup>b</sup> *Law v. Harwood*, Cro. Car. 140; *Brown v. Gibbons*, 1 Salk. 206; 2 L. Raym. 831.

<sup>c</sup> See 21 Jac. I. c. 16, § 7; 3 & 4 Wm. IV. c. 27, § 16. A right to sue of course pre-supposes persons capable of suing and being sued, see *Murray v. East India Comp.*, 5 B. & A. 50; *Douglas v. Forest*, 4 Bing. 686.

<sup>d</sup> See the statutory enactments in 3 & 4 Wm. IV. c. 27, § 2 *et seq.*; 2 Wms. Saund. 63 *d.*

<sup>e</sup> 2 Wms. Saund. 63 *d.*; *E. India Comp. v. Paul*, 14 Jur. 254; *Smith v. Lloyd*, 9 Ex. 562.

<sup>f</sup> *Granger v. George*, 5 B. & C. 149; *Sims v. Brutton*, 20 L. J. Ex. 41; *The Imp. Gas &c. Comp. v. The London Gas Comp.*, 18 Jur. 497.

<sup>g</sup> *Bree v. Holbeck*, Dougl. 655; *Blair v. Bromley*, 2 Ph. 354, and 5 Hare, 542; *Petre v. Petre*, 1 Drew. 397; *S. Sea Comp. v. Wymondsey*, 3 P. W. 143; 3 & 4 Wm. IV. c. 27, § 26.

<sup>h</sup> *Cox v. Dolman*, 2 De G. Mc. & G. 592; *Petre v. Petre*, 1 Drew. 393; *Drummond v. Att. Gen.*, 14 Jur. 141; *Price v. Blakemore*, 6 Beav. 507; *Norton v. Turville*, 2 P. W. 144; *Heath v. Henley*, 1 Ch. Ca. 20; *Garrard v. Tuck*, 8 C. B. 233; *Smith v. King*, 16 East, 283.

<sup>i</sup> *Beckford v. Wade*, 17 Ves. 87.



To criminal proceedings there is not, as a rule, any statutory limitation,<sup>a</sup> but leave will not be given to file a criminal information unless applied for promptly after the offence is committed.<sup>b</sup>

## 2. Delay.

Although the time fixed by the statutes of limitation may not have elapsed, a person may easily by his own delay and laches be deprived of that active aid from a court of Equity, to which he would otherwise have been entitled. This is more especially the case where a person seeks to obtain an injunction or a decree for the specific performance of a contract.<sup>c</sup>

### NOTE TO § 208.

#### 1.

**Interruptions.**—It is an universal rule that when the time limited by statute for the commencement of an action has once begun to run, it continues so to do (whether the person having the right to sue is under any disability or not), until either some step is taken to enforce the primary right or some recognition of it is made by him in whom the correlative duty resides.<sup>d</sup>

The principal acts which require notice as being sufficient to prevent the time from running are—

I. If taken by the person in whom the right resides—the commencement of an action.<sup>e</sup> Entry is not sufficient in the cases provided for by 3 & 4 Wm. IV. c. 27.<sup>f</sup>

II. If proceeding from the person in whom the correlative duty resides—

1. An acknowledgment (in writing signed by him) of the right of the other.<sup>g</sup> There are decisions innumerable to show what is and what is not a sufficient acknowledgment to take a case out of the statutes of limitation.

<sup>a</sup> See Gibbon's *lex temporis*, 85 *et seq.*

<sup>b</sup> *Ibid.* 87.

<sup>c</sup> See for instances, *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515, where there was a protest; *Walker v. Jeffreys*, 1 Harc. 341; *Southcomb v. The Bishop of Exeter*, 6 Harc. 213; *Williams v. Williams*, 17 Beav. 213; *The Great Western Railway Co. v. The Oxford &c. Rail. Co.*, 3 De G. Mc. & G. 341; *Patching v. Dubbins*, Kay 1.

<sup>d</sup> *Rhodes v. Smethurst*, 4 M. & W. 42; *Wych v. E. India Comp.*, 3 P. W. 308; *Anon.*, 2 Atk. 333; 17 Ves. 93.

<sup>e</sup> As to which see Archb. New Pr. 18; 15 & 16 Vic. c. 76, § 12; *Bampton v. Birchall*, 5 Beav. 67.

<sup>f</sup> See § 10; *Doe v. Combes*, 19 L. J. C. P. 306.

<sup>g</sup> 3 & 4 Wm. IV. c. 27, § 14, 28; 9 Geo. IV. c. 14.

To be sufficient, it must be given before the action is brought,<sup>a</sup> be duly signed,<sup>b</sup> and be unqualified.<sup>c</sup>

2. Payment.<sup>d</sup> Payment, of interest, or of part of a principal, must be such as to amount to an acknowledgement by the payer, that the larger sum claimed is owing from him to the payee.<sup>e</sup> Such a payment may operate not only against the person making it, but also against those who are jointly liable with him for the principal sum;<sup>f</sup> and in this respect payment differs from an acknowledgment which affects only the person signing it.<sup>g</sup>

## 2.

Where a person having a right to equitable relief delays seeking it, a protest may not be sufficient to prevent such delay becoming prejudicial to him.<sup>h</sup>

## NOTE TO § 209.

**Extinction of defences.**

Where the effect of lapse of time is not only to bar a right to sue, but to extinguish the principal right itself, or where, as in the case of set-off, the ground of defence might have been made a ground of action, there the statutes of limitation may be successfully replied to a plea setting up such principal right, or founded upon such ground.<sup>i</sup>

## NOTE TO § 211.

**Possession.**

To possess strictly signifies physically to hold or occupy a tangible thing. It is absolutely necessary that positive law should recognise the mere fact of possession, not only so far as to authorise a person to defend himself whilst in possession, but also to aid him in so continuing and in reinstating himself if dispossessed. The mere fact of possession must everywhere

<sup>a</sup> *Bateman v. Pinder*, 3 Q. B. 574.

<sup>b</sup> *Whippy v. Hillary*, 3 B. & Ad. 399; *Hyde v. Johnson*, 2 Bing. N. C. 778.

<sup>c</sup> See *Tanner v. Smart*, 7 B. & C. 603; *Poynder v. Bluck*, 5 Dowl. P. C. 570; *Hart v. Prendergast*, 15 L. J. Ex. 223; *Williams v. Griffith*, 3 Ex. 335; *Evans v. Simon*, 9 Ex. 282. The other cases will be found referred to in the above; *Edmonds v. Goater*, 15 Beav. 415, is scarcely reconcilable with them.

<sup>d</sup> *Whitcomb v. Whiting*, 1 Sm. L. C. 318. As to mortgages, see 7 Wm. IV. & 1 Vic. c. 28; rent, see 3 & 4 Wm. IV. c. 27, § 35.

<sup>e</sup> 2 Wms. Saund. 64 k; *Homan v. Andrews*, 1 Ir. Eq. N. S. 106; *Neve v. Hollands*, 16 Jur. 933, Q. B.; *Hart v. Stevens*, 6 Q. B. 937; *Wainman v. Kynman*, 1 Ex. 118; *Putnam v. Bates*, 3 Russ. 188; *Nash v. Hodgson*, Kay, 650.

<sup>f</sup> *Burleigh v. Stott*, 8 B. & C. 36; *Pease v. Hirst*, 10 ib. 122; *Doeling v. Ford*, 11 M. & W. 329; *Whitcomb v. Whiting*, 1 Sm. L. C. 318.

<sup>g</sup> 9 Geo. IV. c. 14. See the note to *Whitcomb v. Whiting*, in 1 Sm. L. C. 318.

<sup>h</sup> See *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515.

<sup>i</sup> See ante note 2 to § 205; *Smith v. Lloyd*, 9 Ex. 562.

be a state to which certain rights attach, provided the possessor has a juridically recognisable will to remain in possession. In the absence of such a will a person dispossessed can only complain of personal affront. A jurist must therefore extend the notion of mere occupation (*detentio rei*), and require a will to detain (*animus detinendi*) to be added to it in every case in which possession has to be considered. The doctrines of possession would be extremely simple if nothing had occurred besides the logical extension of these fundamental notions. But positive law has introduced so many fictions, and has given the name of possession to so many combinations of dissimilar circumstances, that nothing, save the name, now remains common to them and to the original state of an intentional holding. There are many cases in which a person is treated as if he were in possession, although starting from the above elementary notions he can in no sense be said to be so; and on the other hand there are cases in which, judging from them, a person does possess, who, by law, is treated as if he did not. Seeing then that the nature of possession is so changed, the proposition that it is a mere state cannot be relied upon, and yet the consequences of the original principles must still prevail where no modification can be shown to have been introduced. What modifications have been introduced, it is the province of writers upon this subject to state. [Abridged from Thibaut's *Essay über Besitz und Verjährung*, § 1. 2. 6.]

## NOTE TO § 212.

The propriety of placing the doctrines relating to possession amongst the general principles of jurisprudence instead of amongst the principles more particularly applicable to real property is denied by many writers, but always was strenuously maintained by Thibaut. Possession is indeed a mere state, but it is a state to which are annexed consequences not only of the utmost importance, but of the most general description, even if we exclude those on which so much stress is laid, viz. the right to an interdict, and the acquisition of a title by prescription. Of these general and important consequences it suffices to mention here the right of self-defence, and the (rebuttable) presumption that a person in possession is entitled to what he possesses. This presumption, arising as well in favour of a plaintiff as a defendant, cannot be considered as a mere illustration of the general principle by which the *onus probandi* is thrown on the party demandant in an action. See Froben, § 204.

## NOTE TO § 213.

The work upon possession is Savigny's *Das Recht des Besitzes*. This essay is universally recognised as one of the most masterly that has ever appeared upon any branch of Jurisprudence, and is deserving of the most

careful perusal by the English student.<sup>a</sup> It would have been an easy matter to have illustrated the text by extracting passages from Savigny's treatise, but the translator has refrained from so doing, in the hope that the reader will refer at once to it for further information upon this most important subject.

Upon the English law of possession there is not, to the writer's knowledge, any work, good, bad or indifferent. The doctrines upon this subject are only to be found by wading through a mass of cases upon the old possessory actions, ejectment, trespass, trover and larceny, and as, in some actions, the plea of not possessed puts in issue the right to possess, and not the mere fact of possession,<sup>b</sup> it is necessary to be careful not to be misled by decisions relating to the evidence admissible under that plea. The few remarks upon possession made by Blackstone in his Commentaries are very unsatisfactory, for not only has he attributed no definite meaning to the word possession, but he has constantly confounded together rights so very distinct as a right to possess and a right of possession, i.e. flowing from possession.

#### NOTE TO §§ 214—216.

##### Nature of Possession.

The word possession is used by English writers in many senses, which it is absolutely necessary to distinguish if confusion is to be avoided.

1. Possession denotes an actual occupation or holding. This is usually called actual possession. It is that which is *prima facie* evidence of ownership, and that which is (in general) necessary to support an action of trespass and which, if continued long enough, results in a right to hold.

2. Possession denotes a present right to occupy or to hold. This is what is meant by possession in law, by constructive possession, by legal possession and by right of possession.<sup>c</sup> Possession in this sense does not *per se* result in a title by prescription, but may be lost by a continued actual occupation by another. Moreover, possession in this sense can only be predicated of moveables, and of incorporeal hereditaments, both of which are said to be possessed by him who has the present right to hold or enjoy them; but, even as to moveables, a right to hold them, if the result of a mere permission revocable at pleasure, is not *per se* denoted by possession.<sup>d</sup>

3. Possession often denotes at the same time both actual occupation or detention, and the right to occupy or to hold.

4. Possession is sometimes used, in the plural, to denote what can be possessed.<sup>e</sup>

<sup>a</sup> Sir Erskine Perry has translated the work into English. Von Savigny's Treatise on Possession. London. 1848.

<sup>b</sup> 2 Wms. Saund. 47 *t*; 3 Chitty Plead. 279.

<sup>c</sup> See Gilb. Ten. 21, &c.

<sup>d</sup> See the authorities cited *post* note to § 221, 222.

<sup>e</sup> Britton and Finch both so use the word Possessions.

5. Possession is sometimes synonymous with seisin, e.g. in the maxim *possessio fratris facit sororem esse hæredem*.

6. The phrase "in possession" is used in the sense of present. Thus, as regards the time of enjoyment, estates are divided into estates in possession and estates in expectancy, i.e. remainder or reversion; and, with reference to the necessity of instituting proceedings to obtain actual possession, rights and things are divided into those in possession and those in action.

These different meanings of the word possession render it extremely difficult to deduce from the reported cases any general principles applicable to possession in the very important sense of a *de facto* exercise of a right actual or assumed. To succeed in such an attempt care must be taken not only to ascertain precisely in each case the sense in which the term possession is used, but also to distinguish accurately between—1. Possession as a mere state; 2. The right to possess, i.e. to be now in possession, and; 3. The rights of possession, i.e. resulting therefrom (*jus possessionis* in the sense of the Romans (§ 230), but not in the sense in which that expression is used by Gilbert, Blackstone and others).

An examination of the well known saying, "The possession of a tenant is the possession of his landlord," will at once show the necessity of attending carefully to the sense in which the word possession is used.

1. If the tenant merely holds by the permission of his landlord or as his servant, the tenant is nothing more than the agent by whom the landlord possesses. In this case each is deemed in possession,<sup>a</sup> and, to some extent, in the same sense, for it seems that either can sue in trespass for damage to the thing held;<sup>b</sup> nevertheless, the landlord is not in possession so as to prevent the tenant from gaining a title by virtue of the statutes of limitation, if other circumstances are favourable; for within the meaning of those statutes, the tenant alone possesses.

2. But if the tenant has a right to possess otherwise than as above, his possession is not the possession of his landlord in the sense just explained. In such a case it is clear that, neither with reference to the statutes of limitation nor for the purposes of an action of trespass can the landlord be considered as in possession. Under the circumstances now supposed the meanings to be attributed to the phrase are—1. That so long as the tenant or any one claiming under him is in possession, he shall not be heard to say that he claims to hold by virtue of a title paramount to that of his landlord;<sup>c</sup>

<sup>a</sup> Com. Dig. *Trespass* (B. 2); *Bertie v. Beaumont*, 16 East, 33.

<sup>b</sup> See 1 Chitty on Plead. 196; *Hall v. Davis*, 2 Car. & P. 33; but see Owen, 52.

<sup>c</sup> This is sometimes expressed by saying that the tenant is estopped from denying his landlord's title.

and 2. That as long as the tenant is in possession, so long is the seisin of the freehold undisturbed<sup>a</sup>

#### NOTE TO § 217.

**Natural, Civil.**—A great deal has been written upon the subject of natural and civil possession. The most important views will be found in Pothier *traité de la possession*, c. 1. art. 2; Thibaut *Besitz u. Verj.* § 11.; 1 Van-gerow *Leitf.* § 199; Mackeldey's *Lehrbuch*, § 213; and Savigny's treatise, § 7.

According to the last named author *Possessio* includes—

1. *Detentio*, i.e. a mere fact or state.
2. *Possessio*, i.e. *detentio* accompanied by an *animus detinendi*: a fact or state recognised by law and protected by an interdict.
3. *Possessio civilis*, i.e. *detentio* accompanied by an *animus detinendi* and also by a *justa causa* and by *bona fides*: a fact or state recognised by law, protected by an interdict, and, if continued long enough, conferring a right by usucaption.
4. *Possessio naturalis*, which has a merely negative character and signifies—
  - a. When opposed to *possessio civilis*, every *possessio* other than it.
  - b. When opposed to *possessio* simply, mere *detentio*.

To which of these the term is opposed and what meaning it consequently has can only be ascertained by the context, and is often a matter of considerable doubt.

#### NOTE TO § 218.

**Bona fide.**—A *bona fide* possessor is he who being in actual possession is excusably ignorant of the facts which show that he is not entitled to possess. A possessor, who has documents which show that the right to possess is in another, is not, juridically speaking, a *bona fide* possessor although no *mala fides* in a moral sense can be attributed to him.<sup>b</sup>

#### NOTE TO §§ 221, 222.

#### Acquisition of possession.

Distinguishing as carefully as possible possession as a mere state from the right to possess, whether as owner or by his permission, and confining the word possession to that state which is sufficient ground for an action of trespass against whomsoever may disturb it, the doctrines of the English law respecting the modes in which possession can be acquired, may, sufficiently for the purposes of the present note, be stated as follows.

<sup>a</sup> See Co. Lit. 15 a; Yelverton, 165; 1 Prest. Ab. 254.

<sup>b</sup> See per Lord Hardwicke in *Dormer v. Forster*, 3 Atk. 134, and per L. J. Turner, in *Hicks v. Sallitt*, 3 Do G. Mc. & G. 815.

1. Actual occupation or detention whether of land or goods, and whether legal or illegal, amounts to possession on the part of the occupier or holder.<sup>a</sup> Nevertheless, as against him who has a right to possess and who asserts that right without delay, such occupier or holder is not deemed in sufficient possession to maintain an action of trespass.<sup>b</sup>

2. Possession of moveables is deemed to be in him who has the present right to possess them; consequently on the acquisition of this right, possession (sufficient to support trespass) is also acquired without an actual taking.<sup>c</sup> This doctrine extends as well to persons who have a right to possess as owners, as to those who have, as against the owners, a right to possess for a given purpose or a given time only, but it does not extend to persons whose right to possess is the consequence of a mere permission revocable at pleasure.<sup>d</sup> Moreover, an equitable right to possess is not such a right as is at law sufficient to vest the possession.<sup>e</sup>

3. Possession of land is not acquired solely by the acquisition of the right to occupy; entry is necessary,<sup>f</sup> and must be made *animo possidendi*.<sup>g</sup> However, he who possesses the surface possesses also whatever is below it unless the contrary can be shown.<sup>h</sup> With respect to land, there are moreover two very important doctrines, viz.,

A. When several persons enter to acquire possession, the law imputes possession to that one of them alone who has the better present right to possess; <sup>i</sup> so, where several persons are in occupation of the same house &c., the possession is deemed to be in him who, as between themselves, has the better present right to occupy.<sup>k</sup>

<sup>a</sup> *Cattaris v. Cooper*, 4 Taunt. 547; *Harker v. Birkbeck*, 3 Burr. 1556; *Graham v. Peat*, 1 East, 244; *Chambers v. Donaldson*, 11 East, 65; *Harpur v. Charlesworth*, 5 B. & C. 574; *Amorie v. Delamirie*, 1 Sm. L. C. 151; Bac. Ab. *Trespass*, C. 2 & 3. See as to a mere servant, *Bloss v. Holman*, Owen, 52, and *Hall v. Davis*, 2 Car. & P. 33.

<sup>b</sup> *Brown v. Dawson*, 12 A. & E. 624; *Chapman v. Thumblethorp*, Cro. El. 329; *Taunton v. Costar*, 4 T. R. 431; Vin. Ab. *Poss.* F. pl. 3; Bac. Ab. *Tresp.* E. A stranger cannot avail himself of this doctrine, *Carter v. Johnson*, 2 M. & Rob. 263.

<sup>c</sup> Com. Dig. *Trespass* (B. 4); Bac. Ab. *Tresp.* C. 2; F. N. B. 90 E. 91 B. D. F; *Adams v. Cheverel*, Cro. Jac. 113.

<sup>d</sup> See the cases in 1 Chitty on Pleading, 189, 190.

<sup>e</sup> *White v. Morris*, 16 Jur. 500, C. P.

<sup>f</sup> Bull, N. P. 81 a, note 3; Com. Dig. *Trespass* (B. 3); *Lutwich v. Mytton*, Cro. Jac. 604; which is however opposed to *Anon.*, Cro. El. 46, case 3.

<sup>g</sup> See *Standish v. The Mayor of Liverpool*, 1 Drew. 1; per Lord Tenterden, 7 B. & C. 402.

<sup>h</sup> *Keyse v. Powell*, 2 E. & B. 132.

<sup>i</sup> Perk. Prof. Book, § 218.

<sup>k</sup> Perk. § 219 *et seq.*; Vin. Ab. *Possession*, A. pl. 2. 3. 11. 12.

B. He who, having a right to possess land, enters thereon *animo possidendi*, is deemed to have acquired possession from the time when the right to possess accrued.<sup>a</sup>

3. Incorporeal hereditaments are deemed to be in the possession of him who is entitled to them;<sup>b</sup> but this doctrine clearly does not apply to prevent an usurper from acquiring them by long-continued user.

4. That which is already possessed by one person cannot be adversely possessed by another until the possession of the former is at an end;<sup>c</sup> and a person is often deemed in possession although another is in occupation.<sup>d</sup>

#### NOTE TO § 223.

**By an agent.**—That possession can be acquired through an agent is open to no doubt.<sup>e</sup> Questions of considerable difficulty however arise where a servant, contrary to his duty, takes possession for himself and not for his master; in such a case the master is deemed to have acquired possession if the servant, in the first instance, dealt with the things as if he were acting on his master's behalf, e.g. by putting them in his master's cart or barge; but the master is not deemed to have acquired possession if the servant's conduct showed beyond all doubt that he took the things for himself and not for his master.<sup>f</sup> This last statement however must not be taken to imply that delivery to the servant is an insufficient performance of a duty to deliver to the master sending him.

#### NOTE TO § 225.

**Miscellaneous.**—The possessor of one thing is, in the absence of any reason to the contrary, deemed to possess whatever is on or in it with his consent, e.g. goods placed on board ship are in the possession of him who possesses the ship;<sup>g</sup> so goods in a house are in the possession of the occupier.<sup>h</sup> It is however necessary that the possessor of the house, &c., should, by himself or his agents, have the control of, and the power to obtain access to the things in it; for the occupier of land has not, merely as

<sup>a</sup> Com. Dig. *Trespass* (B. 2); Vin. Ab. *Trespass* (T.); see *Butcher v. Butcher*, 7 B. & C. 399; Roscoe on Real Actions, 705.

<sup>b</sup> See Vin. Ab. *Possession*, A. pl. 1.

<sup>c</sup> See ib. pl. 12, and B. pl. 3; and the judgment in *Brown v. Dawson*, 12 A. & E. 624.

<sup>d</sup> *R. v. Smith*, 16 Jur. 414; *Birtie v. Beaumont*, 16 East, 33; Com. Dig. *Trespass* (B. 2).

<sup>e</sup> F. N. B. 91 E.

<sup>f</sup> See *R. v. Reed*, 18 Jur. 66, and the cases there cited.

<sup>g</sup> Abbott on Shipping, 239, &c. See as to gas *R. v. White*, 17 Jur. 536.

<sup>h</sup> *Ward v. Macaulay*, 4 T. R. 489.



such, the possession of the wild animals upon it,<sup>a</sup> nor has the keeper of a box possession of its contents if the key be purposely kept by another.<sup>b</sup>

Wild animals are not in the possession of a person until they are actually caught; the highest probability that they will be caught is not sufficient.<sup>c</sup>

With respect to symbolical delivery, it is to be observed that the handing over of a mere symbol operates only as evidence of intention. When the key of a place where goods are locked up is handed over to a person to enable him to get at them, there is something more than symbolical delivery; he at once obtains the power of gaining access to the goods, it is he who then detains them, and, when he takes the key, he possesses the goods.<sup>d</sup>

Possession may be lost by one person and gained by another without any actual transfer. This often happens in cases of a sale of chattels; for although they may remain with the vendor, still if they have been set apart for the purchaser and if they are detained solely for him and on his behalf, and not, in any sense, by the vendor for his own benefit, they are deemed not to be in his but in the purchaser's possession.<sup>e</sup>

#### NOTE TO § 226.

#### Loss of possession.

##### 1.

If it be granted that two facts are essential to constitute possession, it is clear that in the absence of one of them there can be no possession. The two passages which are to be found in the Digest, XLI. tit. 2. L. 8, and L. tit. 17. L. 153, certainly at first sight appear to contradict the author's position; those passages run thus—

*Nulla possessio acquiri nisi animo et corpore ita nulla amittitur nisi in qua UTRUMQUE in contrarium actum est.*

The difficulty arises from the ambiguity of the word *utrumque*, but this Savigny has clearly shown to have the following meanings, viz.: 1. Both; 2. One or the other; 3. One or the other, or both—indefinitely.

By adopting either of the last two meanings these texts and the others cited in note (y) cease to be conflicting, and the fundamental principle of possession is consistently carried out.

##### 2.

The modes in which possession may be lost are, to a certain extent, obvious. Three cases, however, deserve notice.

<sup>a</sup> F. N. B. 87 A. note c.

<sup>b</sup> See *Reddell v. Dobree*, 10 Sim. 244.

<sup>c</sup> *Young v. Hichens*, 6 Q. B. 606.

<sup>d</sup> See Savigny's work on possession, § 17, and the observations of Lord Hardwicke, 2 Ves. S. 443.

<sup>e</sup> *Smith's Merc. Law*, 454, &c.; 1 Add. Con. 280, &c.

1. Voluntary abandonment. Abandonment is not to be presumed; a person shown to have been in possession is not, at all events in the first instance, called upon to prove the continuance of an *animus possidendi*, but it is for those who allege an abandonment, clearly to show an *animus non possidendi*. In general, the mere fact that a person quits a place or thing, of which he had possession, is not sufficient evidence of abandonment,<sup>a</sup> nor does he lose possession by merely entrusting the thing to another.<sup>b</sup> If however a thing is delivered up to another, under such circumstances that an immediate countermand is not permissible, then possession is parted with.<sup>c</sup>

2. The hostile conduct of another. In order that possession may be lost in this manner there must be an actual deprivation. An intention, however hostile, is not sufficient; it must be fully carried out, and possession is not lost until deprivation is complete.<sup>d</sup>

3. Misfortune. An observation similar to the last applies, it is apprehended, to cases where a thing is lost, sunk, or otherwise rendered inaccessible. Such an occurrence, followed by inactivity on the part of the possessor, might amount to strong, if not conclusive evidence of abandonment; but if he exerts himself to regain the thing he can scarcely be said to have lost possession until either he discontinues his exertions or reacquisition becomes clearly impossible.

#### NOTE TO §§ 230, 231.

#### Rights of a possessor.

##### 1.

A person in possession has a right so to continue against every one who cannot show that he has a better right to possess;<sup>e</sup> and consequently, *in æquali jure melior est conditio possidentis*.<sup>f</sup> He who attempts to dispossess another or to damage things in his possession may be opposed by force;<sup>g</sup>

<sup>a</sup> A departure may, of course, amount to an abandonment, as in *Blades v. Arundel*, 1 M. & S. 711.

<sup>b</sup> See *Lotan v. Cross*, 2 Camp. 464; *Bertie v. Beaumont*, 16 East, 33; *Reeves v. Capper*, 5 Bing. N. C. p. 141; *R. v. Smith*, 16 Jur. 414. *Lucas v. Nockells*, 2 Y. & J. 304, is a strong case, for there a shipowner was deemed in possession of a ship which he had chartered to another.

<sup>c</sup> See *Hunter v. Westbrooke*, 2 C. & P. 578; *Hall v. Pickard*, 3 Camp. 187; *Ward v. Macaulay*, 4 T. R. 489; *Sweet v. Pym*, 1 East, 4.

<sup>d</sup> See *Viner's Ab. Poss.* A. pl. 3. 5. 12, B. pl. 2. 3; *R. v. Manktelow*, 17 Jur. 352; and the cases on larceny collected in 2 Russell on Crimes, &c. 5 & 6. See as to things distrained, *Whitley v. Roberts*, 1 Mc. Cle. & Y. 118.

<sup>e</sup> Com. Dig. *Pleader* (C. 39); Vin. Ab. *Possession* (F. 3. 5) (G. 6) (I. 1. 4. 5); *Amory v. Delamirie*, 1 Sm. L. C. 151; *Martin v. Strachan*, 5 T. R. 107 n; *Graham v. Peat*, 1 East, 246.

<sup>f</sup> Broom's Max. 561.

<sup>g</sup> Com. Dig. *Pleader* (§ M. 16 and 17).

and an action of trespass will always lie for a wrongful interference with possession.<sup>a</sup>

Possession, whether of realty or of personalty, is *prima facie* evidence of ownership,<sup>b</sup> and whenever a right has been *de facto* exercised for a long time it will always, if possible, be referred by a judge to a lawful origin. Any thing, even an act of parliament, will, in the absence of proof to the contrary, be presumed to have existed if such a right cannot otherwise be upheld.<sup>c</sup>

## 2.

**Mesne profits.**—By the Roman law, a person *bona fide* in possession of property, was not, if evicted, bound to account for the profits derived by him during such possession. By the law of England there seems to be some doubt as to this, for whilst it is clear that *at law* every possessor, whether *bona fide* or not, can be compelled, on eviction, to account for all the mesne profits for such time as the statutes of limitation allow,<sup>d</sup> it is not clear *in equity* whether a *bona fide* possessor must similarly account, except in a few special cases, or whether the rule is the other way, and special circumstances are required to subject him to such a liability.<sup>e</sup>

## 3.

**Improvements.**—By the Roman law, again, a *bona fide* possessor was, on eviction, allowed compensation for lasting improvements made by himself. With us however no such compensation is *at law* obtainable;<sup>f</sup> whilst *in equity*, the Roman law is followed if the possessor is defendant,<sup>g</sup> for then the maxim "He who will have equity must do equity" can be applied. But if the possessor is evicted at law, there is no English authority to show that he could, as plaintiff in equity, actively enforce his claim for compensation. The late Mr. J. Story, in a case with which he took great pains, held that such a claim could be actively enforced, but another

<sup>a</sup> Com. Dig. *Trespass*; 1 Chitty Plead. 186 *et seq.* and the cases cited *ante* in the note to § 221, 2.

<sup>b</sup> *Webb v. Fox*, 7 T. R. 397; *Jayne v. Price*, 5 Taunt. 326; *Doe v. Coulthred*, 7 A. & E. 239; *Wallyn v. Lee*, 9 Ves. 31; *Jones v. Smith*, 1 Hare, 60, but see *per* Lord Eldon, in *Hiern v. Mill*, 13 Ves. 119.

<sup>c</sup> *A. G. v. Evelme Hospital*, 17 Beav. 390; *Mayor of Hull v. Horner*, Cowp. 102; *Gibson v. Clark*, 1 Jac. & W. 159; and see other cases in Best on Presumptions, 144, &c.

<sup>d</sup> 1 Wms. Saund. 277 f.; Roscoe on Real Actions, 705, 6.

<sup>e</sup> See *Dormer v. Fortescue*, 3 Atk. 124; and *Hicks v. Sallitt*, 3 De G. Mc. & G. 782. where the Lord Chancellor took the first view, and L. J. Turner the second.

<sup>f</sup> Roscoe on Real Actions, 329.

<sup>g</sup> *Robinson v. Ridley*, 6 Madd. 2; see the decree in *The York Building Co. v. Mackenzie*, 8 Bro. P. C. 70; 2 Spence Eq. Jur. 304; 2 Story Eq. Jur. § 1237; *ante* note to § 167.

eminent American judge, Mr. Chancellor Kent, has disapproved of this doctrine.<sup>a</sup>

## NOTE TO § 233.

**Interdicts.**

## 1.

For some remarks upon the Roman Interdicts, see *ante* note to § 63.

## 2.

The only remedies which the laws of England afford, and which can with propriety be termed possessory, are the actions of trespass and of ejectment. The former, as will be seen by reference to the authorities referred to in the note to §§ 221, 222, may be brought by any person in possession against whomsoever disturbs him; the only exception being that the action does not lie against him, who, having the immediate right to possess, has recently been deprived of his possession. The action of ejectment lies for the recovery of land which the plaintiff has a right to possess; it is immaterial whether he ever was in possession or not, but if he was in fact ousted, his possession is sufficient evidence of a right to possess, except as against those who can show a better.<sup>b</sup>

## NOTE TO § 234.

**Lien.**

The English word lien means not only a right to retain possession of a specific chattel, as a security for payment of a sum due, (its proper and legal signification<sup>c</sup>), but has been extended so as to include a right to have specific property in the possession of another applied in satisfaction of a claim.<sup>d</sup> A right of the latter description, if recognised only in Equity, is termed an equitable lien,<sup>e</sup> as distinguished from a right of the former description which is, or should be, that denoted by the word lien when used alone. There is little common to the two except the name.

The reader will find an excellent summary of the law of Lien in *Smith's compendium of Mercantile Law*, Bk. IV. c. 2.

1. Even in the absence of any special agreement or usage, he who, at the request of another, bestows labour and skill in the *alteration* and improvement of his moveables has a lien upon them.<sup>f</sup>

<sup>a</sup> *Bright v. Boyd*, 1 Story Rep. 178, cited 2 Story Eq. Jur. § 1237; and see 2 Kent Com. 334 *et seq.* If the improvements were made with knowledge of an adverse claim, compensation is out of the question. *Clare Hall v. Harding*, 6 Hare, 273.

<sup>b</sup> See *Allen v. Rivington*, 2 Wms. Saund. 110 a; *Doe v. Dyeball*, 3 Car. & P. 610.

<sup>c</sup> 2 East, 235.

<sup>d</sup> 1 Story Eq. Jur. 506; and see as to maritime liens, Abbott on Shipping, 551.

<sup>e</sup> Equitable lien also denotes a lien in its proper sense, i. e. a right to retain possession, but cognizable only in a Court of Equity.

<sup>f</sup> *Smith Merc. Law*, 507; *Lempriere v. Pasley*, 2 T. R. 490.

2. Where the contrary cannot be shown, the lien is confined to the thing altered and improved, and only extends to the amount of compensation for the labour bestowed upon it.<sup>a</sup>

3. A lien is a right which is not transferrable,<sup>b</sup> and which is exercisable only passively, namely, by keeping the thing as a security for what is due on it.<sup>c</sup>

4. A lien may exist in respect of a demand not enforceable by action.<sup>d</sup>

5. By virtue of special laws, liens sometimes extend to things other than that on which labour has been bestowed, and are available as a security for other claims than that arising from the bestowal of such labour.<sup>e</sup>

6. A lien is available not only as against the person from whom payment is due, but also against every person whose right to the thing detained is derived from him subsequently to the existence of the lien.<sup>f</sup>

7. But a lien is not available against those whose right to the thing is not derived from such person, or whose right, if derived from him, existed prior to the lien.<sup>g</sup>

8. In Equity, liens, in the proper sense of the word, arise under circumstances under which they do not arise at law. This is especially the case in mortgage transactions, and where the person in possession is so situated as to be able to avail himself of the maxim, "He who will have equity must do equity."

#### NOTE TO § 235.

It will be observed that the interdicts *de vi* and *de vi armata* only lie for the recovery of the possession of immoveables. Savigny is of opinion that the interdict *utrubi* (mentioned in § 234) was applicable for the purpose of reobtaining the possession of moveables in those cases in which the *actio furti*, *actio vi bonorum raptorum*, and the *actio ad exhibendum* were improper (Besitz. § 42).

The word *vis* had a very extended signification (*Sav. p. 477*).

#### NOTE TO § 237.

#### Summary Restitution.

In Fleta (lib. 4. c. 2.) there is a chapter headed *De Remedio Spoliationis*

<sup>a</sup> Where it extends to other things or for other demands, a lien said to be general, in other cases particular, see 2 Add. Con. 1292 *et seq.*; and the cases there.

<sup>b</sup> *Mc Combie v. Davies*, 7 East, 5; *Legg v. Evans*, 6 M. & W. 42. Personal representatives succeed to the liens of the deceased. 1 Swanst. 85.

<sup>c</sup> *Jones v. Tarleton*, 9 M. & W. 672.

<sup>d</sup> *Higgins v. Scott*, 2 B. & Ad. 413.

<sup>e</sup> Smith's Merc. Law, 510.

<sup>f</sup> *Legg v. Evans*, 6 M. & W. 36.

<sup>g</sup> *Pelly v. Wathen*, 7 Hare, 351; and 1 Do G. Mc. & G. 16.

in which the writer lays down the doctrine that a person who has been wrongfully ousted may, without delay, forcibly expel the intruder. But if judicial assistance was required there does not seem to have been any common law remedy of a summary nature by which an ousted possessor could obtain restitution. However, by the statutes relating to forcible entry and detainer, a justice of the peace is empowered, in case a person in possession of land is forcibly expelled or kept out of possession, to enquire into the matter, and, if force has been used, to compel immediate restitution.<sup>a</sup> This summary remedy does not seem applicable, unless the complainant has at least a right to possess for a term, or unless he has been in possession for three years.

After a conviction for larceny, restitution of the thing stolen is awarded, unless it is a valuable security and has come into the hands of a third person who *bona fide* gave value for it.<sup>b</sup>

<sup>a</sup> 8 Hen. VI. c. 9, and 13 El. c. 11.

<sup>b</sup> 7 & 8 Geo. IV. c. 29, § 57.



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*E. J. H. C.*

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